No. 240

In the Supreme Court of the United States

OCTOBER TERM, 1964

LOCAL UNION NO. 189, ETC., AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

JEWEL TEA COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the court of appeals (R. 691–698) is reported at 331 F. 2d 547. The opinions of the district court (R. 661–685) are reported at 215 F. Supp. 837 and 839. The prior opinion of the court of appeals on an interlocutory appeal, affirming the denial of a motion to dismiss the complaint, is reported at 274 F. 2d 217, certiorari denied, 362 U.S. 936. The prior opinion of the district court (R. 58–63), denying the motion to dismiss the complaint, is reported at 1959 CCH Trade Cas. ¶ 69,329.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1964 (R. 699–700). The petition for a writ of certiorari was filed on July 2, 1964, and was granted, limited to two questions, on October 12, 1964. (R. 701–702). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (26 Stat. 209, 15 U.S.C. 1), the Clayton Act (38 Stat. 730, 15 U.S.C. 17, 29 U.S.C. 52), the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. 101 *et seq.*), and the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 87–94.

QUESTIONS PRESENTED

The Court limited the grant of certiorari to the following questions:

1. Based on the district court's undisturbed finding that the limitation "was imposed after arm's length bargaining, * * * and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive," whether the limitation upon market operating hours and the controversy concerning it are within the labor exemption of the Sherman Antitrust Act.

2. Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope

of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board.

INTEREST OF THE UNITED STATES

This case involves important issues concerning the interplay between the National Labor Relations, Sherman and Norris-La Guardia Acts in situations involving multi-employer collective bargaining. More specifically, the principal question is whether a group of employers and a group of unions violate the Sherman Act by entering into a collective bargaining agreement embodying the unions' demands concerning the hours during which meat departments in retail food markets may remain open—a limitation which restricts competition among the markets but which also protects the schedule of working hours and job assignments of the employees represented by the union. This is an area in which the respective policies of the antitrust laws and the labor laws may clash, since the former are designed to eliminate restraints upon competition and the latter to protect employees' rights to engage in concerted action—rights whose exercise may involve competitive restraints. The accommodation and reconciliation of the conflicting policies inherent in these laws is a matter of vital concern to the United States.

STATEMENT

As the court of appeals noted (R. 693), the facts are undisputed. This statement is based primarily on the findings of the district court.

Respondent Jewel Tea Co. ("Jewel") brought this action under the Sherman Act in 1958 against seven locals of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO ("Meat Cutters"), the petitioners in this Court, Associated Food Retailers of Greater Chicago, Inc. ("Associated"), an association of independent food stores, and Charles H. Bromann, Associated's secretary and treasurer (R. 14). Jewel sought a declaratory judgment, injunctive relief and treble damages (R. 14). The complaint alleged that petitioners and Associated had conspired to restrain competition among retail meat markets in the Chicago, Illinois area by limiting the marketing hours for the sale of fresh meat through the following clause in the collective bargaining agreement between the Unions and Associated (R. 22–23, 25, 51):

> Market operating hours shall be 9 A.M. to 6 P.M. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.

The district court, after trial without a jury, dismissed the complaint, holding that the "marketing-hours" clause did not violate the Sherman Act (R. 661–678).[1] The court of appeals reversed (R. 691–698).

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[1] After the district court in 1959 denied petitioners' motion to dismiss the complaint, 1959 CCH Trade Cas. ¶ 69,329 (N.D. Ill.), the court of appeals, on an interlocutory appeal, affirmed, 274 F. 2d 217, (C.A. 7), and this Court denied certiorari, 362 U.S. 936. The district court dismissed the complaint as against Bromann and Associated at the close of the plaintiff's case (R. 657–659, 682–683; 215 F. Supp. 837).

The limitation upon marketing hours originated after a Chicago butchers' strike in 1919 in protest against the then prevailing 81-hour, 7-day week (R. 662). Since that time the collective bargaining agreements always have included a provision limiting working and marketing hours (R. 662–663). The clause has been modified since it first appeared in the 1920 agreement, and has been in its present form since 1947 (*ibid.*). The agreement prohibits the sale after 6 P.M. only of fresh meat, and not of any other products (R. 664).

Collective bargaining between the Meat Cutters and Associated, which represents approximately 1000 food retailers in the Chicago area, including Jewel, has followed the same pattern since 1941 (R. 664–665, 670). Each group prepares its own demands separately, and presents them to the other (*ibid.*). In recent years the contracts have been renegotiated every two years (R. 664).

In July 1957 the Meat Cutters gave notice that they wished to negotiate a new contract (R. 665). In the ensuing negotiations the employers demanded, among other things, night marketing operations, extended working hours and a "flexible day" (R. 665). The unions opposed night work, even though the employers offered wage premiums therefor (*ibid.*) Jewel threatened to sue any employer, as a co-conspirator with the unions, who opposed night operations (R. 666). Despite this threat, the employers, including Jewel, signed the contract presented by the unions which continued the ban upon the sale of fresh meat

after 6 P.M. (R. 666). Jewel then instituted the present suit in 1958 (R. 12, 666).

In 1959, the Meat Cutters and the employer group began negotiations on a new collective agreement. The unions were then willing to negotiate with respect to night marketing hours. No agreement could be reached, however, on an adequate wage incentive for night work and the same marketing hours clause was retained in the 1959 agreement (R. 666).

In the 1961 negotiations the employers again demanded night marketing operations and night working hours, and offered wage incentives for such work (R. 666–667). Jewel, on behalf of the employers, drafted a proposal, presented to the Meat Cutters, which provided that the "hours and days to be worked by each employee shall be determined by the employer" and a subsequent proposal relating to night operations and night work hours (*ibid.*).

Jewel suggested, "as negotiations were 'breaking up' on November 16, 1961," that there be night operations without butchers being on duty (R. 667). The court found (R. 672) that this proposal was contrary to the Unions' self-interest because it "meant that this work would be done by others unskilled in the trade," since the evidence showed that if the fresh meat department were open "[s]omeone must arrange, replenish and clean the counters and supply customer services." The proposal also would have involved "an increase in workload in preparing for the night work and cleaning the next morning" (*ibid.*).

On the basis of the foregoing facts, the district court held (R. 678) that "the purport, history and ef-

fect of the controverted provision indicates that it is within the labor exemption of the Sherman Act * * * and that it imposed no 'unreasonable' restraint on trade." It stated (R. 672):

> * * * the unions' insistence on the retention of the marketing hour restriction was based upon its desire to protect its right not to work at night, and to protect its work from being taken by others. * * * the evidence established that the restriction was imposed after arm's length bargaining, including an overwhelming strike vote against night work, and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive. * * *

The court of appeals reversed (R. 698). It held (R. 694, 695) that "the furnishing of a place and advantageous hours of employment for the butchers to supply meat to customers are the prerogatives of the employer," and that "[s]etting marketing hours is one such proprietary function which an employer has the exclusive right to determine * * *." It stated (*id.* at 694):

> As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business, engaged in handling products in the course of interstate commerce, is a violation of the Sherman Act * * *.

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SUMMARY OF ARGUMENT

I

The marketing hours clause does not violate Section 1 of the Sherman Act.

Where, as here, the marketing hours at which meat is sold at retail are historically and functionally related to hours of work and job opportunities, a contract regulating marketing hours fixes a "term or condition of employment." The subject is one upon which an employer has a duty to bargain collectively under Sections 8(a)(5) and 8(d) of the National Labor Relations Act and in support of which the union has the right to engage in concerted activities, protected against employer interference under Sections 7 and 8(a)(1) of that Act and against judicial limitation by Sections 4 and 13 of the Norris-La Guardia Act. The marketing hours at the meat counters of a retail establishment control the working hours of the Meat Cutters, whose jurisdiction includes all handling of fresh meat, unless the Meat Cutters are willing to yield part of their work to others. The marketing hours clause yields direct benefits for employees by protecting their jobs while scheduling convenient working hours.

A provision in a *bona fide* collective bargaining agreement which yields direct benefits to employees in compensation, hours, employment or working conditions does not violate Section 1 of the Sherman Act even though, as here, the provision also restricts commercial competition among employers in the sale of goods to such an extent that it would violate Section 1

if entered into by employers alone, acting solely in their own self-interest. The establishment of uniform wages, hours of labor and working conditions among competing employers, either by the extension of union organization and separate labor agreements or through multi-employer bargaining, eliminates price competition based upon differences in labor costs. Section 1 of the Sherman Act does not proscribe such agreements, however, both because they are not the kind of restraint upon commercial competition at which Section 1 is directed, *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, and because the congressional policy expressed in a series of enactments dealing with labor standards and labor legislation makes it plain that the requirement of price competition does not extend to competition in reducing costs where those costs are the wages and labor standards of working men.

The same principle applies for the same two reasons where the provision of a direct benefit for employees necessarily involves restricting competition among employers in the product market. Marketing hours and working hours for the sales force cannot be separated. An agreement to delay the installation of labor-saving devices, or to forego their use entirely, may artificially narrow the market for such machinery and may also restrict competition in the devising of new methods of manufacture, but those restrictions upon technological change may also be the only method by which the employees covered by the agreement can protect themselves against total loss of employment. The right to

bargain collectively upon such subjects as the schedule of hours in a retail establishment or elimination of jobs would be impaired, if not virtually destroyed, if no contract could be signed without challenge under Section 1 of the Sherman Act. Similarly, the right to engage in concerted activities in pursuit of such direct employee benefits would be a delusion if any agreement thereby obtained were to be judged by the tests applicable to business combinations. Such contracts are quite different from restrictions upon commercial competition among employers where the only benefit to the employees will be the indirect consequence of enabling their employers to obtain a larger return for their products through the suppression of competition.

Perhaps exceptions must be made for cases (a) in which the labor organization is using its leverage as a union to suppress competition with a business enterprise that it also operates; (b) where the restrictions are shown by independent evidence to have been imposed in aid of a combination of employers existing apart from the collective agreement; or (c) where the restriction, although nominally yielding direct benefits to employees, is essentially a guise for manipulating the market in the interest of employers in the hope that their increased market power would yield consequential benefits to the employees.

This case falls within none of the possible exceptions. The market hours clause was originated by the union in its own self-interest. It directly affects the hours of work of the union's employees. It directly protects them against the loss of a part of the work

within their jurisdiction, which would ensue if other clerks were allowed to attend the meat counters at hours when no butchers were on duty.

II

Petitioners and one of the *amici* urge the Court, *inter alia,* to establish the sweeping rule that there is a labor immunity from the antitrust laws for any contractual stipulation reached as a result of arms-length collective bargaining upon any topic which is a mandatory subject of negotiation under Sections 8(d) and 9(a) of the National Labor Relations Act and which would give rise to a labor dispute under Section 13(c) of the Norris-La Guardia Act. In each instance the critical statutory test is whether the subject is a "term or condition of employment." The argument is that those statutes, read in the light of the evolution of the national labor policy, manifest a legislative intent to take all aspects of labor-management relations involving terms or conditions of employment out from under the Sherman Act.

The primary difference between our approach and the claim to a total labor exemption lies in the treatment of contracts which directly restrict competition among business firms in a product market without a direct benefit to the employees but are executed because the union, acting in its own self-interest, believes the increased market power of the employers may yield higher wages and improved labor standards for employees. There may also be a difference in the treatment of cases in which a clause appearing to yield direct benefits to employees is shown, by appropriate evi-

dence, to be essentially a device for manipulating the product market. We would pretermit any ruling upon such situations. The claimed exemption would render the Sherman Act inapplicable whenever the clause related to a mandatory subject of bargaining.

Since this broad question has been raised, we discuss it at some length in the body of our brief. In the final analysis, however, the answer would seem to turn upon balancing the danger of antitrust decisions interfering with *bona fide* collective bargaining against the risk that a complete exemption from the antitrust laws would threaten the competitive character of parts of the economy by permitting labor unions and employers, working together, to restrict commercial competition. The indications of legislative intent appear at a standoff. There is not a great deal of reliable evidence upon either side of the question; nor much indication that an immediate answer, in broad terms, is required. Neither the scope nor the practical importance of the broad exemption, as opposed to narrower grounds of decision, can be firmly established. Whatever the answer, the marketing hours clause involved in this case does not violate Section 1. That is enough to decide the controversy. These circumstances, we suggest, counsel avoidance of the broader question.

III

The National Labor Relations Act does not have exclusive primary jurisdiction over any aspect of the controversy concerning the legality of the marketing hours clause under the Sherman Act.

The doctrine of primary jurisdiction applies when enforcement of a claim ordinarily cognizable in the courts requires the resolution of an issue which has been placed by statute within the special competence of an administrative body. But the issues involved in an antitrust case growing out of collective bargaining agreements—even the question whether a particular clause relates to a mandatory subject of bargaining—are not issues which the National Labor Relations Board has been given general jurisdiction to consider. There is no suitable procedure for bringing such questions before the Board. The General Counsel has been given the exclusive and unreviewable power to determine what unfair labor practice charges he will prosecute, and a case can come before the Board only if he issues a complaint.

There is no reason to suppose that every alleged violation of Section 1 of the Sherman Act would provide a basis for charging the commission of an unfair labor practice. The most relevant unfair labor practice is a breach of the duty to bargain collectively. But in an antitrust case, by hypothesis, the parties will usually have bargained and then executed an agreement.

The National Labor Relations Board is given no power to issue declaratory orders interpreting Sections 8(d) and 9(a). It has no general regulatory jurisdiction over labor-management relations. Its jurisdiction is limited to preventing and remedying unfair labor practices and to resolving questions of representation.

The structure of the Act also shows that Congress did not intend to deprive the federal courts of power to interpret the National Labor Relations Act when such a question arises in a case within their statutory jurisdiction.

ARGUMENT

Introductory

Experience shows that application of the antitrust laws to employee organization and collective activity involving the labor market is often embarrassing to the courts and inconsistent with the public interest. On the other hand, labor-management negotiations have increasingly come to involve many or even all of the firms competing in a product market and extend to restrictions upon commercial competition among employers which would plainly violate the antitrust laws if imposed by the business firms acting in their own interests rather than as a result of *bona fide* collective bargaining with a labor union. How to reconcile and accommodate these conflicting policies, each firmly embedded in basic legislation, is an extraordinarily complex and subtle problem.

The challenged clause of the collective bargaining agreement involved in the instant case operates to the direct benefit of the employees represented by Meat Cutters because it bars scheduling work at unpleasant or inconvenient hours while at the same time preventing other groups of workers from taking over some of the work within the Meat Cutters' jurisdiction. In addition, the clause undeniably restricts

commercial competition in selling meat by limiting the hours at which meat may be sold even at self-service counters and stores. The court of appeals attempted to draw a dividing line in terms of "proprietary function" and rejected the claim of a labor exemption or immunity from the antitrust laws on the ground that management has the exclusive proprietary function of determining what days in the week and what hours of the day a business will be open (R. 694).

That holding, we submit, is plainly wrong. Where, as here, the hours at which meat is sold at retail are historically and functionally related to hours of work and job opportunities, the marketing hours are "terms or conditions of employment" upon which an employer has a duty to bargain collectively under Sections 8(a)(5) and 8(d) of the National Labor Relations Act and in support of which the union as bargaining representative has a right to engage in concerted activities, protected against employer interference under Sections 7 and 8(a)(1) of that Act and against judicial limitation by Sections 4 and 13 of the Norris-La Guardia Act.

Once this premise is established the present case can be analyzed along two quite different lines:

First, the broad question may be presented whether any provision of a collective bargaining agreement which deals with a "term or condition of employment" within the meaning of the Norris-La Guardia, 47 Stat. 70, 29 U.S.C. 101 *et seq.*, and National Labor Relations Acts, 49 Stat. 449, as amended by

61 Stat. 136, and 73 Stat. 519, 29 U.S.C. 151 *et seq.*, is automatically immune or exempt from challenge under the antitrust laws, at least when the union is not acting as a cat's-paw to aid a conspiracy of employers to manipulate the market. Some of the briefs filed in this case advocate this broad and automatic immunity. They derive no little support from the opinion in *Allen Bradley Co.* v. *Union*, 325 U.S. 797.

Second, the case may be treated as raising only the much narrower question whether this agreement, which restricts competition through differences in marketing hours but also yields direct benefits to the Meat Cutters in work schedules and job protection, is a "contract * * * in restraint of trade", prohibited by Section 1 of the Sherman Act. We submit that, for the reasons stated below in Point I, the market hours clause does not violate Section 1 even though such a restriction would be at least *prima facie* unlawful if imposed by business firms and absent the employees' self-interest.

Under these circumstances we believe that the broader question should be left undecided. Not only is it complex and subtle, but there are few hints and no sure indications of where the legislative branch intended the line to be drawn between the respective regimes of the antitrust and labor laws. The ultimate answers might be greatly affected by the scope given to the phrase "terms or conditions of employment" in the National Labor Relations Act during the still evolving course of interpretation.

The answers could also be influenced by increased knowledge concerning the kinds of direct restrictions upon commercial competition then being negotiated in collective bargaining, their number, and their impact upon the economy. Nor is there any evident public need for a broader decision. The issue does not appear to have vexed collective bargaining, and only on rare occasions permitting eclectic decisions has it come before the federal courts.

Decision of the broader question is not required by the petition for certiorari. Although the first question presented by the petition states the issue in terms suggestive of a claim to the blanket exemption based upon the National Labor Relations and Norris-La Guardia Acts (p. 2 above), we are reluctant to conclude that the limitation upon the grant of certiorari was intended to foreclose consideration of the narrower question whether the employees' self-interest in eliminating night work while protecting their job assignments is not enough to take the marketing hours restriction out of Section 1 of the Sherman Act. In any event, we suggest with deference that if, as we believe, the claim to a complete immunity presents closely-balanced and far-reaching questions whereas it is relatively plain in either event that this particular collective agreement does not violate the Sherman Act, then the Court should pretermit the former question and decide the case upon the latter ground. We urge the narrower ground in Point I below.

Since the broader question has been raised, we analyze it in Point II in some detail. We express no conclusion, however, for the same reasons that we urge the Court to pretermit the question.

In Point III we state our reasons for concluding upon the other question presented that no issue in the case is within the primary jurisdiction of the National Labor Relations Board.

I

THE MARKETING HOURS CLAUSE DOES NOT VIOLATE THE SHERMAN ACT

A. THE MARKETING HOURS CLAUSE DEALS WITH A "TERM OR CONDITION OF EMPLOYMENT" WITHIN THE NORRIS-LA GUARDIA AND NATIONAL LABOR RELATIONS ACTS

The court below concluded that the multi-employer collective bargaining agreement fell outside the legitimate area of collective bargaining and violated the Sherman Act because management has the exclusive proprietary function of determining what days in the week and what hours of the day a business will be open (R. 694). We submit that the holding is plainly wrong. Where, as here, the hours at which meat is sold at retail are historically and functionally related to hours of work and job opportunities, the marketing hours are a "term or condition of employment," upon which an employer has a duty to bargain collectively under Sections 8(a)(5) and 8(d) of the National Labor Relations Act and in support of which the union as bargaining representative has a right to engage in concerted activities, protected against employer interference under Sections 7 and 8(a)(1) of that Act and

against judicial limitation by Sections 4 and 13 of the Norris-La Guardia Act.

Section 13(c) of the Norris-La Guardia Act defines "labor dispute" to include—

> "any controversy concerning terms or conditions of employment * * *."

This Court has consistently given a broad construction to that definition. It has variously held that the phrase embraced stranger picketing in protest of racially restrictive hiring policies, *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; a strike in support of a demand that management not abolish telegraphers' positions without union consent, *Order of Railroad Telegraphers* v. *Chicago & N.W. Railway Co.*, 362 U.S. 330; a refusal to supply union musicians to make recordings, *United States* v. *American Federations of Musicians*, 318 U.S. 741, affirming *per curiam* 47 F. Supp. 304 (N.D. Ill.); and picketing of a foreign flag vessel because of substandard wages paid its crew of foreign nationals, *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365. Compare *American Medical Assn.* v. *United States*, 317 U.S. 519 and *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437. See generally, Etter, *Statutory Definitions of "Labor Dispute,"* 19 Ore. L. Rev. 81, 204 (1940); Note, *Labor Injunction and Judge-Made Labor Law: The Contemporary Role of Norris-La Guardia*, 70 Yale L.J. 70 (1960). Only picketing unrelated to employment policies is outside the scope of the Norris-La Guardia Act. *E.g.*, *Khedivial Line, S.A.E.* v. *Seafarers' International Union*, 278 F. 2d 49 (C.A. 2),

where union picketing of a ship owned by a corporation organized under the laws of the United Arab Republic was carried on not to protest any policy of the ship or the corporation, but to protest UAR government's blacklist of ships stopping at Israeli ports.

Liberal construction of the term "labor dispute" in the Norris-La Guardia Act clearly comports with the will of Congress. The history of labor relations in United States from *In Re Debs*, 158 U.S. 564, and *Loewe* v. *Lawlor*, 208 U.S. 274, up to the passage of the Norris-La Guardia Act was marked by federal court interference with strikes, picketing and other exertions of economic pressure designed to better the workers' situation. See Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U.Pa.L.Rev. 252 (1955); *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 294–296 (1955). The attempt to limit the role of federal courts under Sections 6 and 20 of the Clayton Act was largely emasculated by what Congress thought were unreasonably restrictive judicial interpretations. See Frankfurter and Greene, *The Labor Injunction* (1930). Consequently, Congress spoke in the Norris-La Guardia Act in the most unmistakable terms by depriving federal courts of jurisdiction to issue injunctions in cases involving or growing out of a labor dispute. The underlying public policy of the United States with respect to allowing full freedom for union organization and self-help was implemented by the *Hutcheson* decision, applying the broad definition of "labor dispute" not merely to injunctions but to

all cases under the Sherman Act. *United States* v. *Hutcheson*, 312 U.S. 219.

In the light of this history it would seem almost too clear for argument that the ancient quarrel between the Meat Cutters and Chicago meat markets over employment and marketing hours is a labor dispute within the meaning of the Norris-LaGuardia Act. Certainly it is not taken out of the statute by affixing the label "proprietary function". *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330.

It is equally plain that the various proposals put forward on this subject by the Meat Cutters raised topics on which the employers had a duty to bargain under the National Labor Relations Act. Section 2(9) incorporates almost verbatim the definition of "labor dispute" found in Section 13(c) of the earlier statute. Section 8(d) of the National Labor Relations Act, which defines the duty to bargain collectively, imposes an obligation to meet and confer in good faith with respect to—

> wages, hours, and other terms and conditions of employment.

Section 9(a) of the latter statute makes the union chosen by the majority of the employees the exclusive bargaining representative with respect to—

> rates of pay, wages, hours of employment, or other conditions of employment.

All these definitions, in our view, cover identical ground. The meaning of "terms and conditions of employment" cannot be different in one section of

the National Labor Relations Act from its meaning in another, and its meaning in that statute cannot be different from its meaning in Section 13(c) of the Norris-La Guardia Act from which it was copied.

The court of appeals ruled that a clause fixing the hours at which retail stores market meat cannot be a term or condition of employment because setting marketing hours is a "proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area" (R. 695). The relation of the clause to labor standards cannot be so easily swept aside. The clause served the function of limiting hours of employment, both as to duration and schedule, without loss of job opportunities. The dispute over marketing hours can be traced back over four and one-half decades. Without question it grew out of, and involved, union concern over the hours of work of its members. During all of the labor negotiations from 1957 through 1961, with the exception of a single proposal made after this action was brought, and "as negotiations were 'breaking up' on November 16, 1961" (R. 667), bargaining with respect to night marketing hours was intertwined with proposals that butchers be available to work at night. The union regarded the clause as a means of insuring that its members would not have to work nights without losing some of their work to non-butchers. All this was found by the district court (R. 666–668). The findings bring the dispute and the contract provision well within both the Norris-La Guardia and National Labor Relations Acts.

It will be conceded, we assume, that a restriction upon hours of labor is a term or condition of employment about which an employer has a duty to bargain and which, if controversy breaks out, gives rise to a "labor dispute." The same rule applies to the scheduling of work, in terms of the days of the week and hours of the day.[1a] There would be no difficulty in gathering a long list of contracts prohibiting, or providing premium pay for, work on holidays, or weekends, or at inconvenient hours.

Those objectives could be secured without restricting marketing hours but only at the expense of allowing employers to assign the work of handling meat products to clerks or other employees not represented by the Meat Cutters Union. Far from invalidating the provision, however, this additional purpose ties it the more closely to the statutory terms and conditions of employment. Clauses protecting job opportunities have often been held to be statutory subjects of collective bargaining under the National Labor Relations Act,[2] and controversies over them to be labor disputes within the Norris-La Guardia Act.[3] The

[1a] *Inter-City Advertising Co.*, 61 NLRB 1377, 1384, enforcement denied on other grounds, 154 F. 2d 244 (C.A. 4).

[2] The cases are collected and discussed in the Brief for the National Labor Relations Board in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, No. 14, this Term, pp. 25–26, 58–61. See also the Court's decision in the *Fibreboard* case itself, December 14, 1964 (contracting out of work performed by employees in the bargaining unit a mandatory subject of collective bargaining).

[3] *E.g.*, *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330 (closing of stations and elimination of jobs); *United States* v. *American Federation of Musicians*, 318 U.S. 741, affirming *per curiam* 47 F. Supp. 304 (N.D. Ill.) (substitution of recordings for live musicians).

same is true of clauses and disputes over work assignments arising out of competition for jobs.[4]

It follows that the respondents' case cannot be sustained upon the ground that Meat Cutters and the other petitioners went outside the proper scope of collective bargaining and thereby rendered the agreement subject to scrutiny under the Sherman Act as if no protected interest of employees were involved. Whether the fact that a clause results from collective bargaining upon a term or condition of employment is enough to provide an automatic exemption from the antitrust laws need not and, we urge, should not be decided in this case (see pp. 16–17 above and pp. 50–73 below). For the particular clause here involved, which yields to the employees direct benefits in labor standards and is not merely a colorable device for manipulating business competition, does not violate Section 1 of the Sherman Act.

B. A PROVISION OF A COLLECTIVE BARGAINING AGREEMENT WHICH YIELDS BONA FIDE BENEFITS TO EMPLOYEES IN COMPENSATION, HOURS, EMPLOYMENT OR WORKING CONDITIONS DOES NOT VIOLATE THE SHERMAN ACT

For the purposes of analysis under Section 1 of the Sherman Act contracts between employers and the col-

[4] See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 264–267; *National Labor Relations Board* v. *Radio and Television Broadcast Engineers, Local 1212*, 364 U.S. 573, 576–577, and cases there cited; *Green* v. *Obergfell*, 121 F. 2d 46 (C.A. D.C.); *Yoerg Brewing Co.* v. *Brennan*, 59 F. Supp. 625 (D. Minn.).

lective bargaining representatives designated by their employees[5] may be divided into three classes:

(*a*) Contracts fixing compensation, hours of work, and similar conditions of employment whose direct impact is confined to the labor market and which affect competition in product markets only consequentially;

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[5] We lay to one side two groups of cases in which the contract is not confined to "employees" in a proper sense:

(a) Independent businessmen may not take themselves out of the antitrust laws by assuming the guise of a labor union, or affiliating with a labor union in an effort to regulate the prices which they charge or the persons with whom they will do business, or the persons with whom their suppliers or customers will do business. *E.g.*, *Columbia River Packers Assn.* v. *Hinton*, 315 U.S. 143. See *e.g.*, *Braddick* v. *Federation of Shorthand Reporters*, 115 F. Supp. 550 (S.D. N.Y.); *United States* v. *Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D. N.Y.); *Gulf Coast Shrimpers & Oystermans Assn.* v. *United States*, 236 F. 2d 658 (C.A. 5), certiorari denied, 352 U.S. 927; *United States* v. *National Assn. of Real Estate Boards*, 339 U.S. 485; *Local 36 of International Fishermen, etc.* v. *United States*, 177 F. 2d 320 (C.A. 9), certiorari denied, 339 U.S. 947; *Hawaiian Tuna Packers, Ltd.* v. *International L. and W. Union*, 72 F. Supp. 562 (D. Hawaii); *United States* v. *United Scenic Artists*, 1961 CCH Trade Cas. ¶ 70,015 (S.D. N.Y.); *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94; *Carroll* v. *Associated Musicians of Greater New York*, 1962 CCH Trade Cas. ¶ 70,494 (S.D. N.Y.), reversed 1962 CCH Trade Cas. ¶ 70,560 (C.A. 2); *McHugh* v. *United States*, 230 F. 2d 252 (C.A. 1), certiorari denied, 351 U.S. 966; see Note, *Employee Bargaining Power Under the Norris-La Guardia Act; The Independent Contractor Problem*, 67 Yale L.J. 98 (1957).

(b) It is also clear that while, as Section 6 of the Clayton Act recites, "The labor of a human being is not a commodity or article of commerce," at some point a performance by a human being becomes a trade or business. What in a labor union context would be a "wage" becomes rather a "price" charged for supplying entertainment or business services. Joint

(*b*) Contracts regulating hours, work schedules, work assignments and other matters of direct concern to employees which also operate as direct restrictions upon entry or competitive practices in a product market.

(*c*) Contracts which directly restrict commercial competition in a product market and which benefit employees only indirectly by enabling employers to increase the earning power of the business and thus to pay higher wages.

The wage increases and royalty payments involved in *United Mine Workers* v. *Pennington*, No. 48, this Term, fall in the first category. The marketing hours clause falls in the second category because it both fixes the employees' work schedules and restricts the sale of the employers' goods. The third category is not here involved.[8] Because ... first two categories are before the Court and involve analytical differences, we consider them separately even though the legal conclusions are substantially the same.

"employer" bargaining as to what are ostensibly "wages" in such cases becomes buyer-price-fixing. A concerted employer "lock-out" becomes a commercial boycott. This and other courts have wrestled with such problems in, *e.g.*, *American Medical Assn.* v. *United States*, 317 U.S. 519; 110 F. 2d 703 (C.A. D.C.); certiorari denied, 310 U.S. 644; *Radovich* v. *National Football League*, 352 U.S. 445; *Gardella* v. *Chandler*, 172 F. 2d 402 (C.A. 2); *Anderson* v. *Shipowners Assn.*, 272 U.S. 359 (semble); *Union Circulation Co.* v. *F.T.C.*, 241 F. 2d 652 (C.A. 2).

[8] *Allen Bradley Co.* v. *Union*, 325 U.S. 797, would fall in the third category.

1. Contracts fixing compensation, hours of work and other conditions of employment and only indirectly affecting commercial competition

We submit that a *bona fide* collective bargaining agreement fixing wages, hours of work and similar conditions of employment, the direct operation of which is confined to the labor market and which has only a consequential effect upon the employer market, does not violate Section 1 of the Sherman Act. The very limited qualifications to this rule of law which we subsume under the phrase *"bona fide"* are discussed at pp. 33–37 below.

The formation of a union among workingmen to eliminate competition between them in the sale of their labor potentially affects the prices at which employers will sell the goods they manufacture. The establishment of uniform wages, hours of labor, and working conditions among competing employers, either by the extension of union organization and separate labor agreements or through multi-employer bargaining,[7] eliminates price competition based upon differ-

[7] It cannot be seriously argued that multi-employer bargaining is illegal *per se*. The NLRA, as amended, authorizes the Board to certify multi-employer bargaining units, see *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87. Refusal of an employer to sign an agreement reached by an informal multi-employer group of which he was a member has been held an unfair labor practice. *Town & Country Dairy*, 136 NLRB 517.

Section 20 of the Clayton Act, 29 U.S.C. 52, applies in favor of "any person or persons," defined in § 1, 15 U.S.C. 12, to include "corporations and associations." See H. Rep. 612, 62d Cong., 2d Sess., p. 8 (1912) incorporated in H. Rep. 627, 63d Cong., 2d Sess., p. 30 (1914); 51 Cong. Rec. 14333–4.

ences in labor costs. See generally Kennedy, *The Significance of Wage Uniformity* (1949). Section 1 of the Sherman Act does not proscribe such agreements, however, both because they are not the kind of restraint upon commercial competition at which Section 1 is directed, *Apex Hosiery Co.* v. *Leader,* 310 U.S.

The Norris-La Guardia Act was clearly intended to protect multi-employer bargaining and, in terms, speaks variously of, *e.g.*, "employer organizations," § 4(b); "any of the persons," § 5; "organization of employers" and "associations of employers," § 13(a), etc. See also *United States* v. *United Mine Workers*, 330 U.S. 258, 275. S. Rep. 163, 72d Cong., 1st Sess., p. 19 (1932) states that "the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees." Senator Norris stated:

> "Wherever it can be done this bill applies equally to organizations of labor and to organizations of capital. Organizations of employees and organizations of capital are treated exactly the same." 75 Cong. Rec. 4507 (1932)

See *Local Union No. 861* v. *Stone & Webster Eng. Corp.*, 163 F. Supp. 894 (W.D. La.).

Finally, a variety of antitrust cases decided variously under the Norris-La Guardia Act, the *Hutcheson* doctrine and the rationale of *Apex*, have permitted considerable scope to joint employer activity. *E.g.*, *Clune* v. *Publishers' Assn.*, 214 F. Supp. 520 (S.D. N.Y.), affirmed, 314 F. 2d 343 (C.A. 2); *Kennedy* v. *Long Island Rail Road Company*, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830; *United Brick and Clay Workers* v. *Robinson Clay Product Co.*, 64 F. Supp. 872 (N.D. Ohio); *United Brick and Clay Workers* v. *Junction City Clay Co.*, 158 F. 2d 552 (C.A. 6); *United States* v. *San Francisco Electrical Contractors Ass'n*, 57 F. Supp. 57, 60–61; 62–63 (N.D. Calif.) (*dictum*); and *United States* v. *Detroit Sheet Metal and Roofing Contractors Association*, 116 F. Supp. 81, 90 (E.D. Mich.) (*dictum*). Compare *Anderson* v. *Shipowners Assn.*, 272 U.S. 359. See generally Levy, *Multi-Employer Bargaining and the Antitrust Laws* (1949) and Annotation, *Employer activities, beneficial or detrimental to organized labor, as violating Federal antitrust laws—Federal cases*, 93 L. Ed. 811 (1950).

469, and because Congressional policy expressed in a series of enactments dealing with labor standards and labor legislation, makes it plain that the requirement of price competition does not extend to competition in reducing costs where those costs are the wages and labor standards of working men. Price competition based upon sweated labor is neither national policy nor a purpose of the Sherman Act.

The principle was clearly stated in the *Apex* case:

> * * * an elimination of price competition based on difference in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. [310 U.S. at 503–504.]

It has become the rule of decision in a variety of cases in the lower courts and administrative agencies. See, *e.g., California Sportswear & Dress Assn.*, 54 F.T.C. 835; *Davis Pleating and Button Co.* v. *Calif. Sportswear & Dress Assn.*, 145 F. Supp. 864 (S.D. Cal.); *Greenstein* v. *National Skirt & Sportswear Assn.*, 178 F. Supp. 681 (S.D. N.Y.), appeal dismissed, 274 F. 2d 430 (C.A. 2); *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F. 2d 46 (C.A. 8); and *Schatte* v. *International Alliance*, 182 F. 2d 158 (C.A. 9), certiorari denied, 340 U.S. 827. It has been accepted as a premise by most recent commentators; e.g., Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252 (1955); Bredhoff, *Labor Unions Under the Sherman Act: The Supreme Court Will Take Another Look*, Seventeenth Annual

N.Y.U. Conference on Labor, p. 255 (1964); *Report of the Attorney General's National Committee to Study the Antitrust Laws* 293 *et seq.* (1955); Bernhardt, *The* Allen Bradley *Doctrine: An Accommodation of Conflicting Policies,* 110 U. Pa. L. Rev. 1094 (1962); Sovern, *Some Ruminations on Labor, the Antitrust Laws and* Allen Bradley, 13 Lab. L.J. 957 (1962).

The principle that the elimination of competition among employers based upon differences in wages and labor standards is not a violation of Section 1 rests, as suggested above, upon two foundations. *First,* contracts and combinations eliminating competition in the labor market do not involve the kind of "restraint of trade" to which Section 1 relates. Section 1 "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern" (*Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 492–493). The modifying phrase "in restraint of trade" had a familiar meaning at common law which thus delimited the statutory proscription. *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211.

Second, Section 1 of the Sherman Act must be accommodated with the national labor policy expressed in other Congressional legislation. Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17, made it clear half a century ago that it is not national policy to force workers to compete in the "sale" of their

labor as if it were a commodity. The policy was confirmed and extended in the subsequent Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 101, *et seq.* See *United States* v. *Hutcheson,* 312 U.S. 219. Other Federal legislation establishing minimum wages and maximum hours takes labor standards out of competition. Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 75 Stat. 65, 29 U.S.C. 201–219; Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U.S.C. 35–45; Davis-Bacon Act, 46 Stat 1494, 49 Stat. 1011, 40 U.S.C. 276a.

The National Labor Relations Act declares it to be the policy of the United States to promote the establishment of wages, hours and terms and conditions of employment by collective bargaining between employers and labor organizations freely designated by employees. The national policy towards collective bargaining would be left no scope for its operation if Section 1 of the Sherman Act applied to agreements dealing *bona fide* with matters at the heart of collective bargaining—compensation, hours of work, working conditions and like matters having only consequential effects upon competition among employers in product markets.

The policy of the labor laws also contemplates that there will be national labor organizations seeking to eliminate differences in labor standards among employers. This was common knowledge in 1935 when the Wagner Act was enacted. The aims and practices of such unions were well-known in 1947 at the time of the Taft-Hartley revision. Then and on subse-

quent occasions Congress refused to enact bills aimed at requiring competition among unions in the labor market. *E.g.*, H.R. 3020, 80th Cong., 1st Sess., Sec. 301; H.R. 8449, 82d Cong., 2d Sess., Sec. 2(3). Nor can it be seriously argued that multi-employer bargaining introduces an illegal element or is otherwise opposed to the national labor policy. Cf. *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87.

The basic principle stated above allows no room for inquiry into the character or seriousness of the consequential impact of the wage bargain upon competition among employers, provided that the employees, through the union, are acting in what they conceive to be their own self-interest. It is immaterial that some firms may be driven from the market by inability to pay the union scale.

This is so, we further believe, regardless of the intent of the union in attempting to increase its members' wages. A union may believe that its best interests are served by permitting marginal employers to pay wages lower than the more efficient employers in order to keep them in business to provide work for more members. Cf. *National Assn. of Window Glass Mfgrs.* v. *United States*, 263 U.S. 403. On the other hand, the union may believe its best interests are served by insisting on high wages and a consequent higher standard of living for those of its members who continue to be employed, even though it realizes, and in this sense "intends",[8] that its demand for

[8] See *Apex Hoisery Co.* v. *Leader*, *supra*, 310 U.S. at 485–486.

higher wages, if granted, will put less efficient employers out of business. Nor is it material whether the union leaders desire the resulting stabilization of the industry. The antitrust laws do not force unions to take one position or the other. So long as they act in their own self-interest in demanding higher wages, shorter hours or better working conditions, the resulting agreement will not be an antitrust violation.

Thus, in the pending *Pennington* case we would conclude that the judgment should be reversed if the evidence shows no more than that the United Mine Workers and the employer parties to the wage and royalty agreements knew, or even desired, that the consequence of the increased compensation would be to put some employers out of business, provided that the union was acting *bona fide* in the belief that increased compensation would benefit its members.

Two qualifications should be noted. *First,* a union which owns and operates a business has no more right to use anticompetitive leverage to injure its business competitors than does any other business entity. *E.g., Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F. Supp. 602 (E.D. La.); *United States* v. *Seafarers Sea Chest Corp.,* 1956 CCH Trade Cas. ¶ 68, 298 (E.D. N.Y.). A union acting alone to monopolize or attempt to monopolize a product market violates Section 2 of the Sherman Act. See *e.g., Md. and Va. Milk Producers Assn.* v. *United States,* 362 U.S. 458. Difficult factual problems may arise in this area, for the union presumably does not lose its privilege *qua union* to seek wage increases from competitors of its business

(but see *Bausch & Lomb Optical Co.*, 108 NLRB 1955, which held that an employer has no duty to bargain with a union in business competition with it). Thus, the issue would seem to turn upon whether the union's demands in the collective bargaining were motivated by the interests of its members in directly improved labor standards or only by concern for eliminating business competition.

Second, both the union and employers are guilty of a violation of Section 1 of the Sherman Act where the proof shows an independent conspiracy of businessmen, even though it grew out of a labor dispute, or was implemented through a collective bargaining agreement, or the collective bargaining negotiations were the occasion for its origination. *Allen Bradley, supra*, and *United States* v. *Women's Sportswear Mfgrs. Assn.*, 336 U.S. 460 are such cases. See also *United States* v. *Employing Plasterers Assn. of Chicago*, 347 U.S. 186 and *United States* v. *Employing Lathers Assn. of Chicago*, 347 U.S. 198. As the facts in *Allen Bradley* itself show, liability may follow even though the employers' conspiracy originated from a union proposal. See the facts set out in 41 F. Supp. at 750 and 145 F. 2d 215 at 218, 220, and apparently considered sufficient by this Court, 325 U.S. at 798.

Perhaps the best example of such a case is *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers Assn. of Philadelphia*, 155 F. 2d 799 (C.A. 3). In that private treble damage action, plaintiff newspaper had a collective bargaining agreement with defendant union under the terms of which union

members worked at night on newspaper photo-engraving and, in their spare time although not pursuant to the agreement, on commercial contract photo-engraving. Defendant association of commercial photo-engravers became disturbed with low price commercial competition by plaintiff, and refused to consent to defendant union's supplying workers to plaintiff for commercial photo-engraving at night. (The collective agreement between the union and the association forbade night work without the "consent of both parties.") Although its members rejected a strike vote against plaintiff, pursuant to its agreement with the association, the union ordered its members to refuse to do further commercial work for plaintiff at night. On these facts the trial court held defendants liable, and the Third Circuit affirmed unanimously under *Allen Bradley*. The decision seems clearly correct, for the union lent itself to a business conspiracy to suppress price competition. At the same time, we have no doubt that the union might have independently determined that its employees did not wish to work nights, or that they were overburdened by having to do commercial photo-engraving on top of newspaper photo-engraving. In the latter instances, the union could lawfully have struck for a demand that its members not be required to do commercial photo-engraving at night. Nor would there be a violation of Section 1 in these circumstances if the association of employers signed a contract forbidding night work, either before or after a strike.

Whether the claim be that the union is seeking to use its bargaining power for the benefit of a union-owned business or that the union is aiding an independent conspiracy of employers, it is not enough to make out a violation of Section 1 to prove the contract and that the union pressed for larger increases knowing that price competition and the survival of marginal producers would be adversely affected. It is equally immaterial whether the union believed that such "rationalization" of the industry would benefit its members and, in that sense, desired or intended the consequences. Juries should not be allowed to speculate about why a union bargained for increased compensation. Nor is it enough to show, in addition, that the more favorably situated employers thought that they would benefit from the effect of a high wage scale upon marginal competitors. To permit a finding of a Section 1 violation to be based upon such evidence would defeat the policy of allowing union organization and collective bargaining to take out of competition the costs of higher wages and improved labor standards. The legality of the union's conduct and the resulting agreement should not be made to turn upon either the degree of its economic sophistication or the extent of the employers' opposition. Consequently, a critical inquiry in the *Pennington* case would seem to be whether the verdict is or is not supported by evidence, independent of the agreement and its economic consequences, showing that the union was coming to the aid of a conspiracy of employers or seeking to advance its business invest-

ment rather than the interests of its members in the increased compensation.

2. Contracts regulating hours, work schedules, work assignments and other matters of direct concern to employees which also operate as direct restrictions upon entry or competitive practices in a product market.

In recent years the subject matter of collective bargaining has been vastly expanded so that labor-management agreements now cover a vast variety of subjects other than wages, hours and working conditions. The increased scope of collective bargaining not infrequently results in contracts that must, under any candid description, be acknowledged to operate as direct restraints upon commercial competition.

In contrast with the present case, collective bargaining is sometimes extended to cover competition in the product markets, without direct benefit to employees, solely because of the unions' self-interest in demanding terms in the collective agreement which tend to eliminate business competition in the industry. Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities,* 73 Yale L.J. 14 (1963). If, through the terms of the collective labor agreement, an industry can be "rationalized," prices maintained at artificially high levels and new entry precluded, then the existing companies are likely to realize an improved net margin and be able to pay their workers higher wages. Consider, *e.g.,* the facts in *Allen Bradley,* where electrical equipment manufacturers were not

only able to pay the wages demanded by the union but were also able to sell "their goods in the protected city market at one price and [sell] identical goods outside of New York at a far lower price." (325 U.S. at 800). Anticompetitive industry stability may thus favor higher labor standards and improved stability in labor management relations. Sacrificing a competitive economy which is the very keystone of free enterprise may well be a higher price, however, than Congress intended to pay for those desiderata, and, since that is not this case, we may assume *arguendo* that the terms of a multi-employer collective labor agreement which set product prices,[9] directly limit entry,[10] delimit the companies with which the employers may do business,[11] or allocate the markets or the territories in which competing employers may sell their goods, or which otherwise directly suppress commercial competition in the product market,[12] cannot be justified by the indirect advantages of increasing industry's stability and providing higher profits, or continued profits, in which the union hopes to share. Union self-interest in restraining competition between employers, though admittedly very real, would seem hardly to be the sort of self-interest which can justify a restriction on commercial competition.[13]

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[9] See n. 18 below.

[10] See n. 20 below.

[11] *Ibid.*

[12] See generally, Annotation, *Union Activities Violating the Federal Antitrust Laws—Federal Cases*, 9 L. Ed. 2d 998.

[13] Petitioners Local Unions, appears to concede the apropriateness of this rule for, in commenting on *Allen Bradley*, they say: "* * * the activity did not directly serve a collective bar-

In a much larger number of cases collective bargaining covers methods of competition in the product markets because the same stipulations operate simultaneously in the labor market to the direct advantage of employees. That is true in the present case. The benefit to employees is not merely the indirect consequence of restricting competition among employers but the opposite face of one indivisible coin. Marketing hours and working hours for a sales force cannot be separated. An agreement to manufacture parts instead of buying them may deny the employers access to the market in which parts are available and also restrict competition in the devising of new methods of manufacture, but the restriction upon "subcontracting" may also be necessary to protect the jobs of the employees covered by the agreement. Contracts dealing with the installation of labor saving devices yield to the same analysis.

The validity of such contracts, when the result of *bona fide* collective bargaining, should be governed by much the same test as agreements dealing with compensation and other items having only a consequential effect upon competition among employers in product markets. See pp. 27–37 above. The right to bargain collectively concerning such subjects as the elimination of jobs would be impaired, if not virtually destroyed, if no contract could be signed re-

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gaining objective and was related to wages and work *only* in the sense that the greater profit realized because of the activity enabled the employers to pay better wages and provide more work." Petition, p. 31.

stricting subcontracting or the installation of labor saving machinery without challenge under the Sherman Act. Similarly, the right to strike and engage in concerted activities in pursuit of direct employee benefits would be a delusion if any agreement thereby obtained was subject to challenge under the Sherman Act whenever the direct benefits secured by the employees were as indissolubly linked as two sides of a coin with restrictions upon commercial competition.

Conceivably, courts might decide whether the direct benefits to employees were more or less important than the injury to competition. Actually, that approach would run counter to basic legislative policies. The history of judicial efforts under the Sherman Act to determine where lies the public interest in union organization and labor disputes demonstrates the unsuitability of that vehicle. Labor legislation from the Clayton Act through the Taft-Hartley Amendments to the National Labor Relations Act rejected such use of antitrust law as a means of resolving conflicts between the self-interest of employees, on the one hand, and of employers and consumers, on the other, at least where the employees are not seeking to advance their interests merely by providing a sheltered product market and thus conferring monopolistic power upon their employers. Both the Norris-La Guardia and National Labor Relations Acts also rejected judicial appraisal of the justification for employees' concerted action. *United States* v. *Hutcheson*, 312 U.S. 219, 232; *International Union*,

United Automobile Workers v. *Wisconsin E. R. Board*, 336 U.S. 245, 257–258. It would be quite inconsistent to allow judicial evaluation of the importance of the direct benefits obtained from a collective agreement as compared to the costs of the restriction upon competition.

Accordingly, we submit that a stipulation in a collective bargaining agreement which confers direct benefits upon employees does not violate Section 1 of the Sherman Act even though it also directly restricts commercial competition in the product market, unless it appears that the stipulation is essentially a device for manipulating the product market in the employers' interest. This approach means that judicial scrutiny is at an end once it is established that the restrictions are union-imposed and yield some direct benefit to the employees in wages, hours, employment or working conditions (as opposed to effecting anti-competitive benefits to employers in which the union hopes ultimately to share). Specifically, courts would not be permitted to weigh the social desirability of the labor objective against the effect of the restriction upon competition or the interests of employers or consumers.

Such a rule, while keeping the Sherman Act potentially available to deal with labor-management agreements aimed at stabilizing or increasing profits and wages by eliminating commercial competition, would leave full scope for collective agreements safeguarding other employee interests. Thus, a union of employees could bargain with employers with respect

to the terms and conditions under which the employers could engage independent contractors to perform work that could be, or is being done by the employees, to the extent necessary to protect the integrity of the employees' jobs and wages. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* No. 14, this Term, decided December 14, 1964; *Local 24, Teamsters Union* v. *Oliver,* 358 U.S. 283; *Aetna Freight Lines, Inc.* v. *Clayton,* 228 F. 2d 384 (C.A. 2), certiorari denied, 351 U.S. 950; cf. *United States* v. *Drum,* 368 U.S. 370, 382–383, n. 26; *Mitchell* v. *Gibbons,* 172 F. 2d 970 (C.A. 8). If independent contractors are directly substitutable for employees, then low "prices" paid such subcontractors for their services may not only result in direct loss of employees' jobs, but may also have a directly depressing effect on the wage structure. See *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.,* 311 U.S. 91; *Local 24, Teamsters Union* v. *Oliver, supra; Aetna Freight Lines, Inc.* v. *Clayton, supra; United States* v. *Drum, supra.* We need not consider whether "The scope of the test must accordingly be limited to contractors in functional competition with, and directly substitutable for, union members." Note, *Employee Bargaining Power Under the Norris-La Guardia Act: The Independent Contractor Problem,* 67 Yale L.J. 98, 102 (1957).[14]

[14] The problems presented by a union bargaining on behalf of independent businessmen-members of that union who are in competition with each other as to the terms and conditions upon which the employer will deal with them and with others who compete with them are quite different from the issues raised by the case at bar, and of a wider dimension than can be appropriately discussed within the confines of this brief.

Similarly, in view of the direct union interest in preserving the jobs of its members, unions and employers may lawfully agree that employers will not use certain labor-saving equipment, or that union members will receive higher pay when using labor-saving equipment, or that union members will be employed when labor-saving equipment is used even though they are not needed. *United States* v. *Bay Area Painters and Decorators,* 49 F. Supp. 733 (N.D. Calif.). See *United States* v. *American Federation of Musicians, supra,* and *United States* v. *International Hod Carriers and Common Laborers' District Council,* 313 U.S. 539, affirming *per curiam, United States* v. *Carrozzo,* 37 F. Supp. 191 (N.D. Ill.). Compare *United States* v. *Hamilton Glass Co.,* 155 F. Supp. 878 (N.D. Ill.) and *Alpha Beta Food Markets, Inc.* v. *Amalgamated Meat Cutters and Butcher Workmen,* 147 Cal. App. 2d 343, 305 P. 2d 163. Cf. Note, *Featherbedding and Freedom to Contract Under California's Antitrust Laws,* 11 Stan. L. Rev. 579 (1959). Again, Section 1 would not be violated by a collective bargaining agreement barring all subcontracting, even

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When the union represents competing businessmen as well as employees the union bargaining demand may well be shaped by a desire to suppress price competition between its businessmen-members rather than solely by the employee-members' interest in their job and wage integrity. See *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 94; *Columbia River Packers Assn.* v. *Hinton, supra*; *United States* v. *Gasoline Retailers Assn.,* 285 F. 2d 688 (C.A. 7); *United States* v. *Fish Smokers Trade Council, Inc., supra.* See also *Allen Bradley Co.* v. *Union, supra*; cf. *Quality Limestone Products* v. *Drivers Local 695,* 207 F. Supp. 75 (E.D. Wisc.); *Taylor* v. *International Union of Journeymen Horseshoers,* 222 F. Supp. 812 (D. Md.); *United States* v. *United Scenic Artists, supra.*

though in another context this would be considered a commercial boycott, provided the contract resulted from a direct union interest in preserving jobs for its members. Cf. *Timken Roller Bearing Co.*, 70 NLRB 500, reversed on other grounds, 161 F. 2d 949 (C.A. 6). See generally, Note, *Union-Induced Employer Refusals to Deal: A Merger of Antitrust Standards and NLRB Expertise Suggested*, 67 Yale L.J. 893 (1958). *A fortiori*, in view of the union's direct interest in unionization and in maintaining union standards with respect to wages, hours and working conditions, employers would not violate Section 1 by submitting to a union demand that they not subcontract to non-union shops[15] or to union shops not paying wages or maintaining working conditions prevalent in the area.[16] Sections 8(b)(4) and 8(e) of the National Labor Relations Act, however, outlaw many such agreements.

Three qualifications should be noted. First, as in the case of contracts only consequentially affecting commercial competition, a labor organization which operates a business would violate Section 1 by using its leverage as a union to suppress competition with its business enterprise. See pp. 33–34 above.

Second, the privilege is lost if the restrictions are shown by independent evidence to have been imposed

[15] *Davis Pleating and Button Co.* v. *California Sportswear & Dress Assn.*, *supra*; *Calif. Sportswear & Dress Assn.*, *supra*.

[16] See *Greenstein* v. *National Skirt & Sportswear Assn.*, *supra*; *Judy Bond, Inc.* v. *Kreindler*, 36 Misc. 2d 943, 234 N.Y.S. 2d 375, affirmed, 18 App. Div. 2d 1138, 239 N.Y.S. 2d 532, certiorari denied, 375 U.S. 954.

in aid of a combination or conspiracy of employers existing independently of the collective agreement. See pp. 34–37 above.

Third, there would also seem to be cases in which the restriction, although nominally yielding direct benefits to employees, is essentially a guise for manipulating the market in the interest of employers in the hope that their increased market power would yield resulting benefits to the employees. A union of plumbers, for example, might agree with the local plumbing contractors that each must maintain a permanent office within the geographical jurisdiction of the local union, and that the union would not furnish journeymen to any contractor who had no permanent office within its jurisdiction. Some minor benefits might flow directly to the workers from such an agreement, but its real thrust could well be to prevent outside contractors from bidding for jobs in the area, thus enabling the local contractors to get all the work at higher prices, which they might share with the workers in higher wages. Similarly, in an industry distributing equipment or machines requiring continuing service by sales representatives or factory servicemen, competing manufacturers located in different parts of the country might, together with an industrial union representing their employees, divide the market geographically merely by contracting that no sales or serviceman should be required to travel more than a specified distance from his employer's main plant. Where a contract is shown to be such a device for suppressing business competition, it should be held to violate Section 1.

Although there is room for argument and the point need not be decided, we incline to the view that to bring a case within this third qualification there should be independent proof, beyond any inference that might be drawn from the agreement itself, showing that the contract is essentially a device for manipulating the market. Otherwise, the test would seem to lead back to mere appraisal of the social desirability of the benefits secured by the employees as opposed to the consequences of the restriction.

The point is unimportant in the present case because it cannot be found, by any stretch of the imagination, to fall within any of the three exceptions noted above. The "market hours" clause resulted solely from an independent union determination that its members did not wish to work nights and would not yield the work to other crafts. Associated opposed this demand and yielded to it only reluctantly. Respondent suggests Associated could have insisted on its position more vigorously, but yielding to a union's demand cannot be equated with an independent conspiracy of employers. Nor is it relevant that some members of Associated may not have been wholly unhappy to accept the "market hours" clause, for clearly an employer association has the right to adjust differences of viewpoint within its ranks as to what concessions it will make in the bargaining process. The result of holding otherwise would, in practical effect, be to outlaw multi-employer bargaining.

To be sure, in its opinion the Seventh Circuit wrote (R. 697) that defendants had:

> * * * entered into a combination or agreement, which constituted a conspiracy, as charged in the complaint. It was therefore illegal and void because violative of the Sherman Act. * * * Whether it be called an agreement, a contract or a conspiracy, is immaterial.

In context, however, this clearly meant no more than that the court of appeals thought the "market hours" clause illegal *per se,* and that its originators were therefore conspirators. The court did not find a conspiracy apart from the clause.

The clause itself is plainly lawful under the standard submitted above. In saying this, we assume *arguendo* that the same restriction upon marketing hours would violate Section 1 of the Sherman Act, at least *prima facie,* if imposed by agreement of the employer members of the Association acting among themselves.[17] In such a context it would be a naked limitation on one crucial aspect of retail competition. Rule of reason analysis has never suggested that such a naked elimination of competition can be justified by showing that other elements in the competitive process remain undisturbed. To the extent that *Chicago Board of Trade* v. *United States,* 246 U.S. 231, remains good law, it must be limited to its peculiar facts involving the unique problems of a commodities exchange.

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[17] In our view the denial of certiorari as to Questions 3 and 4 as presented in the petition for certiorari was intended only to foreclose argument upon the above question. See pp. 16–17, *supra.*

In the present case, however, the restraint upon commercial competition is plainly justified by *bona fide* union objectives unrelated to the existence or absence of competition among employers. Consequently, there is no violation of the Sherman Act.

An unequivocal, undisturbed finding establishes that the clause was originated by the union in its own self-interest (R. 662–663, 671–672). It directly affected the hours of work of the unions' members. If meat departments are not open at night, then butchers will not have to work at night. While it might be protested that butchers should have been satisfied with some sort of premium pay for night work, that hardly meets their position that they did not wish to *work* at night, and in any case it is inappropriate for a court in an antitrust case to challenge the wisdom of the union demand when that demand so clearly and directly relates to hours of work.

Superficially it can be argued that the clause is more restrictive of commercial competition than necessary to achieve the union objective, since a self-service meat department could arguably remain open without butchers on duty. Since night operation without night work was suggested only once in the bargaining from 1957 through 1961, it is doubtful that much weight should be given to this possibility, but in any case, if the meat department were open while there was no butcher on duty, there would be substantial likelihood that non-butchers would do butcher's work. This might occur even despite a clause in the agreement to the contrary. The difficulty of policing such an

arrangement would leave butchers with legitimate fear that the agreement would not and could not be honored completely. The pre-packaged meat in self-service meat counters might have to be arranged or replenished. An especially good customer might ask for special service, such as having a round steak ground into hamburger. The temptation on management to permit non-butchers to do these jobs would be severe, or so the union might feel. Moreover, the clause only required that the fresh meat department be closed, not that the entire store be closed, a clause which would be of doubtful legality since it would manifestly be more restrictive than required to meet the concern of the butchers' union. In the circumstances of this case, therefore, it seems plain that the "market hours" clause directly related to hours of work and was no more restrictive than necessary to achieve the union's goal of eliminating night work for its members while preserving the full scope of their jobs.

Unfortunately the clause also inconveniences housewives and other consumers many of whom may wish to buy meat but find it difficult to shop when the meat counters are open. In many instances those consumers are themselves wage earners whose jobs prevent them from doing their marketing except after hours. Thus, the convenience of the Meat Cutters conflicts with the convenience of many consumers. We fully recognize the importance of the consumer interest in this situation. The Congressional policy, however, puts trust in collective bargaining to protect that

aspect of the public interest as well as the self-interest of management and labor. It is to further collective bargaining, therefore, that consumers prejudiced by the restriction will look for the recognition of their interests, and labor and management have the responsibility of finding ways of accommodating the consumers' interests. If labor and management fail in that responsibility, the remedy lies in a legislative change of policy rather than judicial application of the Sherman Act to collective bargaining agreements.

II

WHETHER ALL PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT THAT INVOLVE A "TERM OR CONDITION OF EMPLOYMENT" ARE IMMUNE FROM SCRUTINY UNDER THE ANTITRUST LAWS

Although we believe that this case and the *Pennington* case can and should be decided upon the narrower grounds discussed above, it may be helpful to analyze the broader issue that counsel have also presented, even though we take no position upon the question.

We divide our discussion into two parts: (A) consideration of the differences between the claimed immunity and the scope afforded collective bargaining under the standards advocated above, and (B) analysis of the arguments for and against the claimed immunity.

A. THE DIFFERENCES IN APPROACH

Petitioners and one of the *amici* urge the Court to etsablish the sweeping rule that there is a labor exemption or immunity from the antitrust laws for any

contractual stipulation reached as a result of arms-length collective bargaining upon any topic which is a mandatory subject of negotiation under Sections 8(d) and 9(a) of the National Labor Relations Act and which would give rise to a labor dispute under Section 13(c) of the Norris-La Guardia Act. In each instance the critical statutory test is whether the subject is a "term or condition of employment." The argument is that those statutes, read in the light of the evolution of the national labor policy, manifest a legislative intent to take all aspects of labor-management relations involving terms or conditions of employment out from under the Sherman Act. In effect, the immunity conferred upon unions acting alone, under the doctrine of *United States* v. *Hutcheson,* 312 U.S. 219, would be extended to unions and employers contracting together, provided the union is concerned for the employees' interest and not merely aiding an independent conspiracy of employers. Cf. *Allen Bradley Co.* v. *Union,* 325 U.S. 797.

The claim to a sweeping immunity or exemption based only upon a showing that the challenged clause deals with a "term or condition of employment" differs both analytically and practically from the more eclectic approach we have submitted. The broader argument is based solely upon the Norris-La Guardia and National Labor Relations Acts and appears to leave no room for economic analysis or distinctions in terms of the subject matter of the challenged clause, the directness or indirectness of the restraint upon

business competition or the immediacy or remoteness of benefits to the employees. The more eclectic approach we advocate [17a] goes directly to Section 1, as Mr. Justice Stone did in the *Apex* case, and asks how its words and policy apply to the particular kind of contract involved when read in the light of the national policy expressed in labor legislation.

The differences in result are harder to measure. Earlier we suggested a threefold classification of collective bargaining agreements having an effect upon business competition:

> (A) Contracts fixing compensation, hours of work, and similar conditions of employment whose direct impact is confined to the labor market and which affect competition in product markets only consequentially;
>
> (B) Contracts regulating hours, work schedules, work assignments and other matters of direct concern to employees which also operate as direct restrictions upon entry or competitive practices in a product market.
>
> (C) Contracts which directly restrict commercial competition in a product market and which benefit employees only indirectly by enabling employers to increase the earning power of the business.

Under our view no contract in either of the first two categories violates Section 1 unless it is shown to involve manipulation of the market for the benefit of business firms rather than *bona fide* collective bargaining. Consequently, except for any difficulties of

[17a] In addition to the broad argument petitioners also present grounds for reversal somewhat similar to our approach.

classification, the primary difference between our approach and the claim to a total labor exemption lies in the treatment of contracts which directly restrict competition among business firms in a product market because the increased market power of the employers may yield higher wages and improved labor standards for employees. We would pretermit this question. Petitioner and one *amicus* apparently claim immunity for such contracts provided that the challenged clause deals with a "term or condition of employment" which is a mandatory subject of collective bargaining under Sections 8(d) and 9(a) of the National Labor Relations Act. There may also be a secondary difference in the treatment of the situations envisaged at pp. 45–46 above, in which the clause appearing to yield direct benefits to employees is shown, by appropriate evidence, to be essentially a device for manipulating the product market. Although we tend to treat them as violations of Section 1 but lay the question aside as not presented, under the AFL–CIO view the exemption would seem to be applicable.

A number of uncertainties make it difficult to appraise the practical importance of the differences. In the first place, so far as we are aware there are no studies of the various forms of agreement that unions and management might negotiate in this area. It is clear that labor unions quite naturally realize that, if through the terms of the collective labor agreement, an industry can be "rationalized," prices maintained at artifically high levels and new entry precluded, then the existing companies are likely to

realize an improved net margin and be able to pay their workers higher wages. That was part of the theory of the National Recovery Administration in 1933–1935. This union self-interest in demanding terms in the collective agreements in an industry which will tend to eliminate business competition has sometimes led to the extension of collective bargaining to cover competition in product markets. See Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14, 21–23 (1963). Thus, unions have interested themselves in the prices at which a product was sold,[18] the volume of production,[19] entry into the market,[20] and allocating territory.[21] Other restrictions can readily be imagined.

Second, there is a lack of empiric evidence not only as to the frequency with which such restrictions ap-

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[18] Boston Herald, Nov. 9, 1954, p. 10, col. 1; Dunlop, *Wage Determination under Trade Unions*, 104–05 (1944); *Commonwealth* v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751; *Local 175, International Brotherhood of Electrical Workers* v. *United States*; 219 F. 2d 431 (C.A. 6), certiorari denied, 349 U.S. 917; *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732 (C.A. 9), certiorari denied, 348 U.S. 817; *Converse* v. *Highway Construction Co.*, 107 F. 2d 127 (C.A. 6).

[19] See *Penello* v. *International Union, United Mine Workers*, 88 F. Supp. 935 (D.D.C.). But note that the three day week and memorial holidays may equally have been methods of equalizing employment.

[20] *United States* v. *Employing Plasterers' Ass'n of Chicago*, 347 U.S. 186; *United States* v. *Chattanooga Chapter*, 116 F. Supp. 509 (E.D. Tenn.); *Allen Bradley Co.* v. *Union*, 325 U.S. 797; *Mayer Bros. Poultry Farms* v. *Meltzer* 274 App. Div. 169, 80 N.Y.S. 2d 874.

[21] Boston Herald, Nov. 9, 1954, p. 10, col. 1.

pear in collective bargaining agreements but also as to their effect upon the economy. One might infer lack of importance from the absence of particularized complaints if these were not the kinds of agreements that the parties prefer not to publicize.

Third, it is not clear how far the subject matter of such agreements will be held to be within the area of mandatory bargaining under the National Labor Relations Act, for which alone the exemption is claimed. The National Labor Relations Board holds that the subject matter of mandatory bargaining is not unlimited. Probably most of the restrictions in this category would fall outside that area. Today's decisions, however, hardly provide a fixed point of reference in predicting the future course of interpretation of the phrase "terms and conditions of employment" for the purposes of the National Labor Relations Act. The area of collective bargaining has been constantly expanding. Many topics are held to be mandatory subjects of bargaining today which were scarcely thought of in labor-management negotiations in 1935. And there is every reason to preserve the flexibility necessary to meet problems still unforeseen. See, generally, Brief for the National Labor Relations Board in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* No. 14, this Term.

While lacking a reliable basis for judgment, we would estimate that the additional scope of the claimed immunity would cover an area having substantial but not great significance—a significance, however, more likely to grow than diminish.

Section 1 of the Sherman Act applies to every contract in restraint of trade without distinction among persons or organizations. The very generality of the words would seem to put a heavy burden upon anyone seeking to exempt particular contracts in restraint of trade from the statutory proscription because of the character of the parties among whom the contracts were negotiated or whose interests they served. Price-fixing, exclusion from the market and other methods of providing shelter from commercial competition are no less restrictive when the stimulus to agreement comes from the interest of employees in increasing the profitability of the employers' business than from management. In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 489, this Court held, after full consideration, that it "must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative."

After the enactment of Section 6 of the Clayton Act declaring labor not to be a commodity or article of commerce, it should have been plain that the Sherman Act did not apply to the formation or operations of employee organizations aimed at increasing the return for personal services by bringing to bear the power of wage earners' collective action in the labor market. The debate was terminated by the Norris-La Guardia Act and *United States* v. *Hutcheson,* 312 U.S. 219. Such activities, especially when union organization is industry-wide, necessarily eliminate a source of price competition in the product market but that is not

the kind of restriction thought to violate Section 1. *Apex Hosiery Co.* v. *Leader, supra.*

It is equally clear that the system of collective bargaining established by the National Labor Relations Act would be badly constricted, if not destroyed, if the Sherman Act applied to labor contracts between employers and labor unions in exactly the same way as to contracts among employers alone. Industrial or market-wide unions must seek to eliminate the differences in labor costs which might be a source of competition in product markets and, if collective bargaining is to work at all, the elimination will be by agreement with employers. Furthermore, there are, as we have seen at pp. 37–50 above, a number of areas in which some curtailment of commercial competition is indissolubly linked with the protection of employee interests of the kind collective bargaining was intended to secure. The present case affords a plain example; the scheduling of working hours for retail clerks necessarily determines the hours a store will be open.

From these premises it can be strongly argued that, when Congress adopted the policy of protecting the organization of labor unions and requiring employers to bargain collectively with the representatives chosen by a majority of the employees, it intended to immunize the resulting agreements from attack under the antitrust laws. Up to a point that conclusion seems inescapable, and we advocate it to the extent indicated under Point I.

Doubt arises only with respect to contracts restraining commercial competition among employers

either without direct benefit to employees or where the nominal direct benefit is shown to be a subterfuge for manipulation of the market.[22] In such cases three additional factors seem relevant:

(1) The core of labor's interest, historically and practically, lies in wages, hours, employment, and working conditions. Demands aimed at "stabilizing" an industry by reducing commercial competition are, by and large, comparatively new and peripheral.

(2) Such direct restraints upon competition among employers in the sale of their goods and services are unnecessary to unionization and fruitful collective bargaining.

(3) The effect of a direct restraint upon commercial competition among employers in the product market is the same from the standpoint of the buying public whether the restraint be imposed by employers alone or by employers and employees acting together. Where the only function of the restraint is to increase the employers' gross return for his goods or services, the only difference between the two cases seems to be that in one case the higher return may go only to the owners and managers whereas it will be shared by employees in the other.

The claim to a broad immunity, in contrast to a more eclectic approach, would seem to depend upon whether these three factors *might* warrant a difference in the legal conclusion. If all collective bargaining agreements relating to terms and conditions

[22] The second alternative refers to the problem discussed at pp. 45–46 above.

of employment must be lumped together and either held immune or subjected to the same standards as agreements among business firms, then surely the inference to be drawn from the labor legislation enacted by Congress over the past half century is that all should be immune. The damage that would be done to collective bargaining by any other rule in the areas in which it would be constricted or frustrated by application of antitrust principles is much greater than the damage to the economy that might flow from granting immunity in the more doubtful area. The argument is also made, not without force, that the introduction of these analytical distinctions, which are always clearer in principle than in practice, would itself have a tendency to interfere with normal bargaining. Yet, collective bargaining is now highly sophisticated in the segments of the economy in which the questions are likely to arise and more complex problems are regularly solved by the lawyers and economists who participate. Congress, in leaving to the courts the task of reconciling the sometimes conflicting policies of the labor and antitrust laws, may well have intended not an "either/or" solution but to leave room for the subtler accommodations achievable in judicial administration.

Nothing in the words of the National Labor Relations Act gives any strong indication of the extent to which the policy of requiring collective bargaining about terms and conditions of employment was intended to immunize from scrutiny under Section 1 of the Sherman Act every agreement upon any subject

within that range. The duty is "to meet and confer in good faith" about any union proposal concerning a subject of mandatory bargaining. Perhaps the words can be read as imposing a duty to reach an agreement without regard to the provisions of other laws, but it seems most unlikely that any such absolute privilege was intended. In *International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, the Court said that the statutory scheme left no room for the "application of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions," but it also noted that the Sherman Act "sets some outside limits * * * on what their agreement may provide." There is no logical inconsistency between requiring an employer to meet and confer in good faith about a given subject and permitting him to reply to a specific clause proposed by the union, if he speaks in good faith, that the union is asking him to do something illegal.

Nor does the existence of a duty to bargain collectively upon a particular subject license the employer and union to enter with impunity into agreements which violate other regulatory laws. The criteria to be followed in making lay-offs, promotions and demotions are statutory subjects of collective bargaining, but no one would suggest that the ensuing contract need not comply with the prohibitions against racial discrimination in the Civil Rights Act of 1964, 78 Stat. 241. Despite the broad language of the *Oliver* case when taken out of context, there would seem also

to be room for the operation of some State laws. In the construction industry it would be feasible to bargain about the kinds of materials workers will handle (*e.g.*, plastic pipe), or about methods of construction, but compliance with a collective bargaining agreement could hardly be an excuse for violating a local building code. The age at which workers must be retired is a compulsory subject of bargaining, but no employer whose plant is located in a State which prohibits discrimination on grounds of age against workers less than 65 years old is under a duty to accede to a union proposal that all men be retired upon reaching 60 years of age. Contra: *Walker Mfg. Co.* v. *Industrial Commission,* 57 LRRM 2553 (Wisc. Circuit Ct., Dane County, October 19, 1964).

The reason for concluding in all these cases that the National Labor Relations Act does not authorize management and labor to arrange whatever substantive terms and conditions of employment they wish, free from the restraints imposed by other laws, is that the Act is primarily concerned with a method of establishing terms and conditions of employment, by which negotiations between employers and employees as a group are substituted for unilateral dictation. Senator Walsh's much quoted statement that the Wagner Act "does not seek to inquire into" what happens behind the doors where labor and management are bargaining may overstate the situation somewhat (see the discussion in *National Labor Relations Board* v. *Insurance Agents' International Union,* 361 U.S. 477, 484–487 and Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401 (1958), but Con-

gress took pains in 1947 to reaffirm, both by pronouncement, H.R. Rep. No. 245, 80th Cong., 1st Sess., pp. 19–20, and by statute, 61 Stat. 142, 29 U.S.C. 158(d), that the Board was not to control the terms of the labor-management bargain through the guise of protecting the bargaining process. As this Court said in *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395, 402: "Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." No serious interference with that policy is likely to result from requiring the parties to collective negotiations to accommodate themselves to the surrounding framework of regulatory laws, including those affecting substantive terms or conditions of employment, provided that the law applies regardless of whether the term is established by employers unilaterally, by individual contracts, or by collective bargaining. For an employer to reject a particular proposal upon the ground that it is illegal, is not a refusal to bargain; it is a response rejecting the demand and, if made in good faith, stands upon the same footing as other grounds of rejection.

Exact precedents are lacking but interpretation of the National Labor Relations Act has generally taken note of the need to fit it into the surrounding legal system. *National Labor Relations Board* v. *Fansteel Corp.*, 306 U.S. 240; *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U.S. 31. In the leading case of *American News Co.*, 55 NLRB 1302, the Board held that a strike to compel a wage increase pro-

hibited by the Act of October 2, 1942, 56 Stat. 765, was not a protected concerted activity. On other occasions the Board has allowed employers to respond to unions' bargaining proposals that they questioned their legality. *Fort Industry Co.*, 77 NLRB, 1287; cf. *Frohman Mfg. Co.*, 107 NLRB 1308.

We do not suggest that the foregoing analysis demonstrates that no inferences can be drawn from the National Labor Relations Act favorable to a broad immunity from the antitrust laws for all collectively bargained restrictions upon competition provided they deal with a mandatory subject of bargaining. We do say that it raises substantial question and that the inference is by no means compelling. It would seem, moreover, that there may be positive gains in separating the interpretation of the phrase "terms or conditions of employment" for the purposes of the National Labor Relations Act from the determination of what agreements between labor unions and competing employers violate the antitrust laws. If the automatic consequence of holding that a subject falls within the area of mandatory bargaining is that it is exempt from the Sherman Act, a new element quite foreign to the purposes and policies of the National Labor Relations Act will be interjected into administrative and judicial rulings upon the subject matter of mandatory bargaining. It might be preferable to interpret Sections 8(a)(5) and 8(d) pursuant to the criteria appropriate to questions of labor policy, and to leave questions of the interplay between labor and antitrust policy to separate resolution.

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The Clayton and Norris-La Guardia Acts, as interpreted in *United States* v. *Hutcheson*, 312 U.S. 219, also furnish strong arguments for the view that the antitrust laws do not apply to collective bargaining agreements negotiated by a union acting *bona fide* in the interest of employees provided the agreement is confined to terms and conditions of employment. Under those acts the Sherman Act has no application to a peaceful strike or other concerted employee activities seeking to compel an employer to make any concession in a dispute concerning any term or condition of employment. In *Hutcheson* the Court said (p. 232):

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Literally, the Norris-La Guardia and Clayton Acts do not cover collective bargaining agreements reached pursuant to the negotiations or the exertion of economic pressure by the union. Section 4 of the Norris-La Guardia Act removes federal court jurisdiction to issue injunctions against only the following types of activity: (a) striking, (b) joining a labor union, (c) paying or receiving strike benefits, (d) aiding litigation, (e) picketing, (f) assembling peaceably, (g) stating an intention to do any of the above, (h) "[a]greeing with other persons to do or not

to do *any of the acts heretofore specified,*" and (i) inducing any of the above. None of the "acts heretofore specified" covers the agreement reached as a result of the collective bargaining process. While the Norris-La Guardia Act protects a union in striking, nothing in the language of the Act protects even from injunctive relief the agreements for which a strike may be conducted.

The same conclusion applies to Section 20 of the Clayton Act. Not only is the language of Section 20 similarly limited to unilateral employee conduct but it has never been suggested that the substantive exemption under the *Hutcheson* doctrine can be broader than the jurisdictional limitations imposed by the Norris-La Guardia Act, Section 4. See *United States* v. *United Mine Workers*, 330 U.S. 258, 270.

While the words are thus limited, there is an obvious incongruity in holding that, although the union is free to make war upon employers in order to achieve an illegal demand, both are subject to prosecution if the employers sign a treaty of capitulation. This Court noted the difficulty and assumed that such a settlement would come within the immunity in *Allen Bradley Co.* v. *Union*, 325 U.S. 797, 809:

> Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufac-

> tured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act.[23]

The point was forcefully stated in *United States* v. *Bay Area Painters and Decorators Joint Committee*, 49 F. Supp. 733, 738 (N.D. Calif.):

> The unions must necessarily "negotiate" and "bargain collectively" with the employers. It would seem beyond belief that Congress intended to protect the machinery used by labor to enable it to negotiate and bargain collectively for terms and conditions of employment and then, after it completes its negotiations and has made its bargain through agreement with employers, to withdraw that protection and leave the parties to the agreements liable for prosecution for criminal conspiracy. * * *

Several opposing considerations must be taken into account in appraising the force of the inference.

(i) The importance of the incongruity may be exaggerated. The vast majority of bargaining demands, even if jointly conceded by a group of employers, would not violate the antitrust laws under the tests suggested in this brief. Clauses that restrict commercial competition in the product market without direct benefit to employees are not commonly sticking points in collective negotiations. They are far more likely to result from mutually beneficial collaboration.

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[23] See also *Hunt* v. *Crumbock*, 325 U.S. 821, where the Court found the union's conduct in forcing an employer out of his business to be outside the antitrust laws even though it was through the medium of a closed shop agreement.

(ii) In analogous situations the Court has left to Congress the task of correcting any incongruity or unfairness in immunizing union activities aimed at inducing an employer to engage in unlawful conduct. Precisely this question was raised in *United States* v. *Building and Construction Trades Council*, 313 U.S. 539. As disclosed in the Briefs for the United States, Nos. 839 and 840, October Term, 1940, the indictment in the *Building and Construction* case charged the defendant union with boycotting firms who employed men of competing Local 806, which had been certified as the collective bargaining agent of the boycotted firms, for the purpose of forcing those firms to bargain with and employ members of defendant union. Had the employers acceded to this demand they would have been in clear violation of then Sections 8(a) (3) and (5) of the National Labor Relations Act. The facts in *United States* v. *United Brotherhood of Carpenters and Joiners*, 313 U.S. 539, were in all material respects identical. In both cases the Court affirmed *per curiam* the district court decisions sustaining demurrers to the indictments; the opinions cited the *Hutcheson* case without comment. No violation was found on much the same facts in *Fur Workers Union No. 21238* v. *Fur Workers Union, Local No. 72*, 308 U.S. 522,[24] decided two years earlier.

[24] In *Fur Workers Union, Local No. 72* v. *Fur Workers Union, No. 21238*, 105 F. 2d 1 (C.A. D.C.), Local 72, representing a minority of a company's employees, picketed to demand that the company rescind both recognition of the majority union, *No. 21238*, and the collective labor agreement the company had with it. Both Union No. 21238 and the company sought injunctive relief, with the company arguing that the union's strike was an attempt to compel it to commit an un-

A similar decision was rendered, albeit under another statute, in *National Labor Relations Board* v. *Drivers Local Union*, 362 U.S. 274, where the Court refused to bring picketing within the broad language of NLRA Section 8(b)(1)(A)), even though its announced objective was to compel an employer to grant the union recognition in violation of Section 8(a)(1). Moreover, there are marked differences between (i) allowing injunctions on the basis of judicial evaluation of the often-exaggerated, ill-phrased and uncertain union demands during organizational campaigns and labor disputes and (ii) subsequent adjudication of the legality of the actual terms of an executed agreement.[246] Compare *Retail Clerks, Local 1625* v. *Schermerhorn*, 375 U.S. 96, with *Local No. 438* v. *Curry*, 371 U.S. 542.

(iii) While there is considerable overlap, the policy considerations which moved Congress to take the federal courts out of union organizational activity and labor disputes are not all the same as those which could be thought involved in defining the proper role of the courts in dealing with agreements to which a group of employers is a party and which may restrict competition between them. To pour antitrust policy with respect to such agreements into the Norris-La

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fair labor practice under Section 8(a)(5) of the NLRA. The court of appeals nevertheless held that the Norris-La Guardia Act barred injunctive relief. This Court granted Union No. 21238's petition for certiorari and affirmed *per curiam*, 308 U.S. 522, citing *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, and *New Negro Alliance* v. *Sanitary Grocery Co.*, *supra*.

[246] The amendments adding Sections 8(b)(4)(C) and 2(b)(7) removed most of the two incongruities noted in the text.

Guardia Act mold, fashioned with an eye only upon unilateral concerted activity, would seem to extend the implications of that statute into an area dissimilar to any that Congress considered. The policy of a statute inheres in its limitations quite as much as its affirmations. The *Hutcheson* decision was itself an extrapolation from the general policy thought to lie behind the express provisions of the Norris-La Guardia Act, for they were framed explicitly in terms of limitations upon the jurisdiction to issue injunctions. Carrying the policy over to criminal prosecutions and civil actions for damages extended the bare meaning of the words. It would seem a double and, while permissible, more doubtful inference to conclude that the underlying policy is also to be applied to a quite different subject matter neither suggested by the language nor considered by the Congress.

(iv) The precedents in this Court appear to leave the question open. There is no decision applying the Sherman Act to a *bona fide* collective agreement, for *Allen Bradley* and its successors were cases in which the union joined an independent conspiracy of employers. On the other hand, the *arguendo* assumption in *Allen Bradley* strongly supports the argument that Section 1 of the Sherman Act is inapplicable to a *bona fide* labor agreement confined to terms and conditions of employment.

Hutcheson was not this kind of case. It concerned union picketing and operation of a boycott in a jurisdictional dispute. Indeed, in laying down the rule

applicable to union activities, Mr. Justice Frankfurter expressly noted that it only applied in evaluating union objectives "under § 20," and Section 20 does not speak of the agreement reached as a result of the bargaining process. All of the subsequent decisions resting on *Hutcheson* were cases in which the gravamen of the offense was unilateral union conduct of one sort or another—picketing, striking, boycotting, etc.[25]

Similarly, the antitrust cases in this Court in which the Norris-La Guardia Act was held to ban injunctive relief directly have also been cases primarily involving unilateral conduct.[26] Indeed, it does not appear that the Norris-La Guardia Act has ever been applied by this Court in any other context to immunize from judicial scrutiny an agreement entered into in settle-

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[25] *United States* v. *American Federation of Musicians*, 318 U.S. 741, *supra* (union refusal to supply musicians to make recordings and insisted upon the hiring of standby musicians where recordings used); *United States* v. *Building and Construction Trades Council*, 313 U.S. 539 (union boycott of materials trucked by companies who hired members of an NLRB-certified competing union); *United States* v. *United Brotherhood of Carpenters and Joiners*, 313 U.S. 539 (boycott of purchasers of plywood from a company which hired members of a competing union which had won an NLRB election as its bargaining representative); and *United States* v. *International Hod Carriers & Common Laborers' District Council*, 313 U.S. 539, affirming *per curiam*, *United States* v. *Carrozzo*, 37 F. Supp. 191 (N.D. Ill.) (strikes and threats of strikes to prevent the use of ready-mix concrete trucks and, where used, to force use of same work force used with on-site mixers.)

[26] *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (picketing of retail stores selling milk at cut-rate prices); *New Negro Alliance* v. *Sanitary Grocery Co.*, *supra* (picketing against racially restrictive hiring policies).

ment of a labor dispute.[27] Categorization of the Railway Labor Act cases involving the Norris-La Guardia Act is more difficult but all in which an injunction was refused were cases of unilateral union activity.[28]

In the final analysis resolution of the question discussed in this part of our brief would seem to turn upon balancing the danger of antitrust decisions interfering with *bona fide* collective bargaining against the risk that a complete exemption from the antitrust laws would threaten the competitive character of parts of the economy by permitting labor unions and employers, working together, to restrict commercial competition. The indications of legislative intent

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[27] *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 (picketing for a closed shop); *Marine Cooks & Stewards* v. *Panama Steamship Co.*, *supra* (picketing of foreign ship operated by foreign crew in protest of low wage rates); *Fur Workers Union No. 21238* v. *Fur Workers Union, Local No. 72*, 308 U.S. 522 (union picketing to compel employer to recognize and negotiate with a union other than the one which represented the majority of the companies' employees); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (strike in violation of a collective labor agreement).

[28] *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry. Co.*, *supra* (union strike to compel the railroad to agree not to abolish telegraphers' positions without union consent; see especially note 14 and accompanying text at 338–339 when read against the dissent at 363); *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western R. Co.*, 321 U.S. 50 (union threatened violence and interference with operation of railroad when bargaining negotiations broke down). In a number of cases an injunction was granted. *E.g.*, *Brotherhood of Engineers* v. *Louisville and Nashville R. Co.*, 378 U.S. 33; *Brotherhood of Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30; *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515; *Brotherhood of Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528; *Brotherhood of Trainmen* v. *Howard*, 343 U.S. 768; *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232.

appear at a standoff. There is not a great deal of reliable evidence upon either side of the ultimate question; nor much indication that an immediate answer, in broad terms, is required. The marketing hours clause involved in this case does not violate Section 1. See pp. 18–50, *supra*. That is enough to decide the controversy. In these circumstances we suggest that the considerations stated above counsel avoidance of the broader question, leaving it to legislative resolution should the need become pressing before it must be decided here.

III

THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE EXCLUSIVE PRIMARY JURISDICTION OVER THE CONTROVERSY CONCERNING THE LEGALITY UNDER THE SHERMAN ACT OF THE PROVISION IN THE COLLECTIVE BARGAINING AGREEMENTS LIMITING MARKETING HOURS

We have urged in Point I that the Court should reverse the judgment of the court of appeals on the ground that the "market hours" provision does not violate the Sherman Act; and that the Court therefore need not reach the difficult question, discussed in Point II, whether there is a broader immunity or exemption from the Sherman Act. We now show that, even if the Court were to hold, as petitioners contend, that any collective bargaining agreement settling a dispute over "terms and conditions of employment" does not violate the Sherman Act, it is for the courts, and not for the National Labor Relations Board, to determine whether the particular dispute is within that category. Two lines of reasoning support this conclusion. *First,*

there is no method by which the parties to an antitrust case could be assured of obtaining a Board ruling on the question. The Board's procedures do not lend themselves to the determination of issues of federal labor law that arise in antitrust litigation. Moreover, there would rarely be a case in which the conduct constituting the alleged violation of the Sherman Act could be brought within the familiar rubric of an unfair labor practice. *Second,* the statutory scheme of the National Labor Relations Act shows that Congress intended the federal courts to determine questions under that Act that arise in antitrust cases within their statutory jurisdiction.

A. THE NATIONAL LABOR RELATIONS BOARD IS NOT AN APPROPRIATE FORUM FOR DETERMINING QUESTIONS UNDER THE NATIONAL LABOR RELATIONS ACT THAT ARISE IN ANTITRUST CASES

"The doctrine of primary jurisdiction * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific R. Co.,* 352 U.S. 59, 63–64; cf. *Far East Conference* v. *United States,* 342 U.S. 570, 574–575. But before the doctrine can come into play, it is necessary not only that the issue be within the special competence of the administrative agency but, equally importantly, that the

regulatory statute provide suitable procedures for its resolution.

1. In the cases in which the doctrine heretofore has been applied, the litigants in the judicial proceeding have been able to obtain an administrative ruling by filing a complaint with the agency. Thus, after this Court held in the *Western Pacific* case, *supra*, that the Court of Claims should have referred the issue of tariff interpretation there involved to the Interstate Commerce Commission, the United States filed a complaint with the Commission raising that issue.[29] Similarly, in the *Far East* case the Court, in holding that the Federal Maritime Board had primary jurisdiction over a dispute concerning the legality of a steamship conference's use of a "dual rate" system, ruled (342 U.S. at 576) that the United States could file a complaint with the agency challenging the system under the Shipping Act, 1916.

The National Labor Relations Act, however, provides no similar procedure by which the parties to a pending antitrust action can be assured of obtaining a Board ruling on an issue allegedly within that agency's primary jurisdiction. Unlike most regulatory agencies, the Board's adjudicative processes are not automatically put into operation by filing a complaint with it. The Board's processing of unfair-labor-practice cases involves a two-step procedure. First, a charge that an unfair labor practice has been committed must be filed with a Regional Director of the Board. Section 10(b) of the Act; Part 101 of

[29] *United States* v. *Western Pacific R. Co.*, 309 ICC 249.

the Board Rules and Regulations, 29 C.F.R. § 101.2. On the basis of such charge and after investigation, the General Counsel (acting through the Regional Director) decides either to proceed further with the case (by issuing a complaint) or to drop it. Section 3(d) of the Act, 29 U.S.C. 153(d); 29 C.F.R. § 101.4–101.8. The Act gives the General Counsel "'final authority' respecting the investigation of charges, the issuance of complaints, and the prosecution of complaints before the Board." (*Lewis* v. *National Labor Relations Board,* 357 U.S. 10, 15–16). Thus, if the district court in the present case had remitted the parties to the Board, and the respondent then had filed a charge that the unions had committed unfair labor practices, the General Counsel, had he believed that under the Board's decisions no violation were shown, could have refused to issue a complaint and thus terminated any administrative proceeding at the outset.

If the General Counsel does not issue a complaint, the Act provides no method by which the Board can determine whether particular conduct constitutes an unfair labor practice. Although the Board's Rules of Practice provide for the issuance of advisory opinions and, upon petition of the General Counsel, for declaratory orders respecting narrow jurisdictional issues, the Board in such rulings merely states whether it would assume jurisdiction over a particular controversy, and does not discuss the merits of the dispute.[30]

[30] The Board will give an advisory opinion on whether it will assert jurisdiction over a labor dispute which is the subject of a pending proceeding before a State or Territorial

There are no procedures, however, for obtaining declaratory rulings on questions of labor law arising in antitrust litigation. For the Board to improvise such procedures would appear inconsistent with the basic statutory plan of the National Labor Relations Act to limit rulings on unfair-labor-practice questions to situations where the General Counsel has issued a complaint following the filing of a charge.[30a]

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court or agency, but such opinion does not cover either "the merits of the case" or "whether the subject matter of the dispute is governed by The Labor Management Relations Act of 1947, as amended." 29 C.F.R. 101.39, 101.40. Such opinions, moreover, ordinarily are rendered only to decide whether the amount of commerce involved satisfies the Board's jurisdictional limits. See, *e.g.*, *Jemcon Broadcasting Co.*, 135 NLRB 362; *Hartford Bldg. Maintenance Co.*, 145 NLRB 140, 55 LRRM 1173; *National Bulk Carriers*, 134 NLRB 1186.

The Board also permits the General Counsel, in cases where the Regional Director dismisses both a charge and a representation petition, to obtain from the Board a declaratory order as to whether it would assert jurisdiction over the dispute. 29 C.F.R. § 101.42. This procedure is followed because an appeal from dismissal of a charge is taken to the General Counsel, while an appeal from dismissal of a representation petition is taken to the Board, and the latter deems it appropriate "[t]o obtain uniformity in disposing of such cases on jurisdictional grounds at the same stage of each proceeding." *Ibid.*

[30a] The only specific statutory authority of which we are aware which would permit the Board to establish an advisory opinion procedure for use in antitrust cases is § 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004(d), which provides: "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." But the "controversy" that a declaratory order under this Section may terminate or the "uncertainty" that it may remove relates to matters which are within the agency's gen-

2. It is difficult to see how, within the framework of the statutory issues the Board decides under the National Labor Relations Act, the substantive questions under that Act that arise in antitrust litigation could be presented to the Board for determination. The question whether a particular dispute relates to "terms and conditions of employment" is significant under the Labor Act because the answer determines whether the parties have a duty to bargain about it. The Board does not decide that question in the abstract, however, but only in determining whether one of the parties has committed an unfair labor practice by refusing to bargain about the subject of the dispute.

But the fact that a particular issue is not a mandatory subject of bargaining does not preclude the parties from voluntarily bargaining about it or one party from acceding to the other's demand. The district court found that both sides bargained extensively about the market-hours clause, and that, although the employers tried to eliminate it, they were unsuccessful and ultimately accepted it (R. 665–667). The execution of a collective bargaining agreement is, without more, rarely an unfair labor practice, even though the agreement contains provisions which cover matters

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eral regulatory jurisdiction. Cf. *Frozen Food Express* v. *United States*, 351 U.S. 40, 44. As developed in the text, there can be no live "controversy" or "uncertainty" over whether a particular subject relates to "terms and conditions of employment" under the National Labor Relations Act when the parties in fact have bargained about and reached agreement on the subject.

that are not mandatory subjects of bargaining. Indeed, the only situation in which the National Labor Realtions Act expressly condemns the mere entry into an agreement with a majority representative as an unfair labor practice is the prohibition in Section 8(e), 29 U.S.C. (Supp. V) 158(e), against so-called "hot cargo" agreements. In the present case, therefore, neither the unions' demand for the market-hours clause, nor the execution of the agreement containing it, constituted an unfair labor practice, and there would be no basis in the Labor Act for the Board to pass upon the question whether the clause related to "terms and conditions of employment."

In the present case the respondent employer, although it was a party to the agreement, subsequently challenged it by filing an antitrust suit, and presumably would have been willing to file a charge with the Board. In most instances, however, antitrust violations growing out of a collective bargaining agreement are likely to involve situations where all the parties to the "dispute" fully concur in the anti-competitive terms upon which the "dispute" is "settled." In such a situation the agreement could be challenged only by strangers to it, namely, by non-parties who have been injured, or by the United States in a civil or criminal action.

We assume that the United States could file with the Board an unfair-labor-practice charge.[31] But for the Board to determine unfair-labor-practice questions at the suit of some one not a party to any labor dispute, who seeks their resolution solely to aid it in performing its sovereign function of enforcing another statute, would represent a sharp break with the traditional practice before that agency. Furthermore, even assuming that a Board unfair-labor-practice finding were a necessary predicate for government civil antitrust cases, it certainly cannot be assumed that Congress intended to condition criminal cases upon such an administrative determination. See *United States* v. *Pacific and Arctic Ry. and Nav. Co.*, 228 U.S. 87; *United States* v. *Borden Co.*, 308 U.S. 188; *United States* v. *Railway Express Agency, Inc.*, 89 F. Supp.

[31] The National Labor Relations Act does not specify who may file an unfair-labor-practice charge. Section 10(b) merely authorizes the Board to issue a complaint "Whenever it is charged that any person" has committed an unfair labor practice. The Board's Rules of Practice provide that "any person" may file such a charge (29 C.F.R. § 102.9), and define "person" to have the same meaning as in Section 2 of the Act (*id.*, § 102.1). Section 2 defines "person" as "includ[ing] one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." The question whether the United States is a "person" within this definition has not been decided. This Court has treated those not specifically excluded from the definition as included. *Local Union No. 25* v. *New York, N.H. & H.R. Co.*, 350 U.S. 155, 160; *Plumbers' Union* v. *Door County*, 359 U.S. 354, 358–359.

981, 986 (D. Del.). Indeed, permitting an administrative agency to decide portions of a criminal case might present serious constitutional questions involving the right to trial by jury. See Fraenkel, *Can the Administrative Process Evade the Sixth Amendment?* 1 Syr. L. Rev. 173 (1949). Yet there cannot be a different rule as to the Board's primary jurisdiction depending upon whether the issue arises in a civil or a criminal case.

3. Even if issues of labor law arising in antitrust cases somehow could be brought within the familiar fabric of unfair-labor-practice charges, the Board in most instances probably would be barred from adjudicating them by Section 10(b) of the Act (29 U.S.C. 160(b)). That Section provides that no complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing and service of the charge with the Board. Many antitrust violations are not known about within six months after their commission, and the extensive investigation frequently required before an antitrust action can be begun, either by the United States or by private parties, means that the suit cannot be filed until several years after the offense was committed. Congress has recognized these realities in Section 5b of the Clayton Act (15 U.S.C. 15b), by providing that suits for damages under the antitrust laws may be brought by private parties or by the United States within four years after the cause of action accrues. There is no statute of limitations, of course, on a civil suit brought by the United States to enjoin violations

of the antitrust laws, and the applicable period of limitations governing criminal antitrust proceedings is five years (18 U.S.C. 3282). Thus, in most antitrust cases the Board would not be able to issue a complaint because the conduct upon which the charge of unfair labor practices was based occurred more than six months prior to its filing.

B. THE COURTS RATHER THAN THE BOARD ARE THE PROPER AGENCIES TO DECIDE LABOR LAW QUESTIONS ARISING IN ANTITRUST CASES

Despite the strong considerations against giving the Board exclusive primary jurisdiction over questions under the National Labor Relations Act that arise in antitrust litigation, the contrary conclusion might follow if Congress clearly had so indicated, either explicitly or impliedly through the statutory plan. Congress concededly did not expressly so provide, and we submit that the proper inference to be drawn from the statutory design is that Congress intended the courts, and not the Board, to decide such questions.

Petitioners argue (Br. 110–115) that the rationale of this Court's decisions in the preemption field is equally applicable here. They contend that permitting the district courts to decide questions of federal labor law that arise in antitrust cases would lead to the same conflicts between the Board and the courts that the preemption doctrine is designed to avoid. But as indicated by the opinion last Term in *Teamsters Local 20 v. Morton*, 377 U.S. 252, the preemption doctrine is largely designed, not to prevent

courts from adjudicating questions which the Board can adjudicate, but to bar the application of substantive State law upsetting the balance of power between labor and management expressed in the national labor policy. See also *Garner* v. *Teamsters Union,* 346 U.S. 485, 500.

There are many situations in which both federal and state courts are permitted to entertain claims and decide issues that might also be within the jurisdiction of the National Labor Relations Board. For example, Section 301 of the Labor Management Relations Act gives the federal courts jurisdiction over suits on collective bargaining contracts. The preemption doctrine does not bar the courts from entertaining such actions, even though the breach of contract also constitutes an unfair labor practice over which the Board concededly would have jurisdiction. *Local 174* v. *Lucas Flour Co.,* 369 U.S. 95, 101 n. 9; *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, 245, n. 5; *Smith* v. *Evening News Association,* 371 U.S. 195. For the preemption doctrine "merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations" (*Retail Clerks Local 1625* v. *Schermerhorn,* 375 U.S. 96, 103), and where Congress has indicated that it intends to permit the courts to decide questions of federal labor law, the preemption doctrine will not be applied to oust them of that jurisdiction.

At the same time that Congress added Section 8 (b) (4) to the Act, it enacted Section 303 of the Labor Management Relations Act which gives persons in-

jured by jurisdictional strikes and secondary boycotts the right to sue in the district court for damages. In *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, this Court rejected the contention that an action could not be maintained under Section 303 unless and until the Board had found that the conduct violated Section 8 (b) (4) (D). This holding thus rejected a claim which, in effect, was that the Board had primary jurisdiction to determine whether the particular conduct upon which the suit was grounded was an unfair labor practice. The decision reflects the Congressional recognition, in giving the district courts plenary authority to entertain these suits, that "the facts in such cases are easily ascertainable by any court and do not require the expertness supposed to be one of the virtues of the administrative law procedure." S. Rep. No. 105, Supp. Views, 80th Cong., 1st Sess., p. 54.[32]

If the courts are not required to refer labor cases to the Board to decide questions under the National Labor Relations Act, *a fortiori* they are not required to refer antitrust cases involving similar issues. There is no indication in either the language of the National Labor Relations Act, its legislative history or its basic policy, or in judicial decisions, that Congress in that Act intended in any way to limit the

[32] The original Senate bill, to which that report was directed, authorized the district courts to grant injunctions as well as damages. But the Committee's comment on the courts' ability to decide all the issues in cases under Section 303 is equally applicable to the statute actually enacted, which provides only for damage actions.

plenary authority of the federal courts to decide antitrust cases, or to require them to defer to the Board's expertise whenever such cases have subsidiary issues of labor law or policy. On the contrary, granting such authority to the Board would raise the danger that "the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the [Board]" (*California* v. *Federal Power Commission*, 369 U.S. 482, 490).

In *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, this Court held that a State could not apply its antitrust law to prevent enforcement of a provision in a collective bargaining agreement prescribing terms and conditions which regulate the minimum rental and other terms of lease when a motor vehicle is leased to a carrier by an owner who drives his vehicle in the carrier's service. The Court ruled that since the provision dealt with a mandatory subject of collective bargaining under federal law (*i.e.*, wages), the State antitrust law could not "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. * * * The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here" (pp. 295–296). After noting that federal law created the duty to bargain collectively and that federal law is "applicable to the agreement the parties made in response to that

duty" (p. 296), the Court, citing two cases involving federal court suits in which the Sherman Act had been held to cover union activities,[33] stated that "federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide" (*ibid.*). In the light of the question before the Court in the *Oliver* case—whether the National Labor Relations Act preempted the subject to which the State antitrust law was sought to be applied—the latter statement supports the view that, where a collective bargaining agreement is challenged under the Sherman Act, the courts are to decide all questions which determine its validity and need not await an initial determination by the National Labor Relations Board.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1964.

[33] *Allen Bradley Co.* v. *Union*, 325 U.S. 797; *United States* v. *Employing Plasterers Assn. of Chicago*, 347 U.S. 186.

APPENDIX

Sherman Antitrust Act, Section 1 (26 Stat. 209, as amended, 15 U.S.C. 1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commence among the several States, or with foreign nations, is declared to be illegal. * * *

Clayton Act, Sections 6 and 20 (38 Stat. 731, 738, 15 U.S.C. 17, 29 U.S.C. 52):

> SEC. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
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> SEC. 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at

law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Norris-La Guardia Act, Sections 1, 2, 4, 5 and 13 (47 Stat. 70, 71, 73, 29 U.S.C. 101, 102, 104, 105, 113):

SEC. 1. No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with this provision of this chapter; nor shall any such restraining order or temporary or permanent injunction be is-

sued contrary to the public policy declared in this chapter.

SEC. 2. In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumreated in section 104 of this title.

SEC. 13. When used in this chapter, and for the purposes of such sections—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representatives of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

National Labor Relations Act, Section 1 (49 Stat. 449, as amended, 61 Stat. 136, 29 U.S.C. 151):

* * * * * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act, Section 8 (49 Stat. 452, as amended, 61 Stat. 140, 29 U.S.C. 158):

(a) It shall be an unfair labor practice for an employer—

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title.

* * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder,

and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * *

National Labor Relations Act, Section 9 (49 Stat. 453, as amended, 61 Stat. 143, 29 U.S.C. 159):

* * * * * *

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *

Labor Management Relations Act, 1947, Section 301 (61 Stat. 156, 29 U.S.C. 185):

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the

organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Labor Management Relations Act, 1947, Section 303 (61 Stat. 158, as amended, 73 Stat. 545, 29 U.S.C. 187):

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.